TANGLING WITH ENTANGLEMENT: TOWARD A CONSTITUTIONAL EVALUATION OF CHURCH-STATE CONTACTS

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I THEME

"The First Amendment¹ has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."² Despite Justice Hugo Black's assertion, the Supreme Court itself has recognized that some church-state contacts are necessary and inevitable.³ This has created "considerable internal inconsistency" within the law, as the Supreme Court has "struggled" to develop an effective standard for judging church-state contacts.⁴

One of the most recent standards used by the Supreme Court in applying the First Amendment religion clauses to church-state contacts is the so-called "excessive entanglement" test that it first mentioned in *Walz v. Tax Commission*⁵ and more fully explained in *Lemon v. Kurtzman*.⁶ Although "[s]ome members of the Court have criticized the anti-entanglement requirement as a superfluous statement of the secular effect rule,"⁷ close scrutiny reveals a potentially useful tool for evaluating the constitutionality of government contacts with religious bodies. The current test is not immune from all criticism, however, as it has created considerable confusion in the lower courts.⁸ The ever-increasing array of conflicting lower court

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Amend. I. The First Amendment is often divided into two religion clauses: the "Establishment Clause" and the "Free Exercise Clause."

2. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

3. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

4. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Even the metaphorical "high and impregnable" wall between church and state is in reality "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular [church-state] relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

5. 397 U.S. 664 (1970).

6. 403 U.S. 602 (1971).

7. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-12 at 865 (1978). In *Wolman v. Walter*, 433 U.S. 229 (1977), five Justices in two separate opinions expressed various reservations concerning the test. 433 U.S. at 255 (White & Rehnquist, JJ. separate opinion); 433 U.S. at 255-62, 64-66 (Brennan, Marshall & Stevens, JJ.).

8. See text and notes at notes 25-71, *infra*.

decisions evidences both "the chaotic state of legal theory in this area of constitutional law"⁹ and the need for a more explicit and carefully formulated test.

The entanglement doctrine should identify government contacts with religious organizations that further or impair religion by directing or influencing religious matters.¹⁰ Such identification is important since "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."¹¹ To this end, we propose a reformulated entanglement test that focuses on three factors: (1) the religious character of the activity involved in the contacts, (2) the frequency and effect of the contacts, and (3) the government interest served. This factor analysis is meant to direct courts to the functional issues in church-state contacts and help them determine whether such contacts impermissibly direct or influence religious activity.

To present the proposed factor analysis, this article first reviews the Supreme Court cases creating the entanglement test and some of the lower court cases explaining and applying the test. Discussion of the proposed test follows in order to demonstrate its usefulness in distinguishing permissible from impermissible church-state contacts. The article closes by applying the reformulated entanglement test to the lower court cases in an effort to reconcile the conflicting and confusing array of decisions.

II

THE ENTANGLEMENT TEST IN THE CASE LAW

A. *Supreme Court Cases*

The use of an entanglement test to determine the validity of a statute requiring a church-state relationship first surfaced in *Walz v. Tax Commission*.¹² In that case, a taxpayer challenged the New York City Tax Commission's grant of property tax exemptions to various church properties, claiming that the tax exemption on church property forced him to contribute indirectly to religious bodies, in violation of the religion clauses of the First Amendment. After discussing the First Amendment principles at length, the Supreme Court effectively summarized "[t]he general principle deducible from the First Amendment and all that has been said by the Court" on the religion clauses by declaring that it could "not tolerate either governmentally established religion or governmental interference with religion."¹³ To avoid governmentally established religion, the Court suggested the need to examine whether the purpose of a statute is to sponsor or support religion. But such an examination "does not end the inquiry," according to the Court, as a statute may also violate the First Amendment by an effect, *i.e.*, interfering with

9. *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316, 1320 (D. Minn. 1978).

10. See *Lemon v. Kurtzman*, 403 U.S. 602, 634 (1971) (Douglas, J., concurring); *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting).

11. *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948).

12. 397 U.S. 664 (1970).

13. *Id.*, at 669.

religion.¹⁴ Thus, the Court added a second step to its analysis: “[w]e must also be sure that the end result—the effect—is not an excessive government entanglement with religion.”¹⁵ Without elaborating on what constitutes “excessive government entanglement,” the Court simply found that there was “no genuine nexus between tax exemption and establishment of religion” and held that the tax exemption did not violate the First Amendment.¹⁶

One year after the *Walz* decision, the Supreme Court, in *Lemon v. Kurtzman*,¹⁷ used the excessive entanglement doctrine to strike down, as unconstitutional, state statutes providing various forms of aid to church-related elementary and secondary schools. Excessive entanglement, however, was just one part of a three-prong test suggested by the Court. Under the three-prong test, a statute must (1) have a secular legislative purpose, (2) have a primary effect that neither promotes nor inhibits religion, and (3) not result in excessive entanglement. Failure to comply with any one aspect of the three-part test, according to the Court, will render a statute unconstitutional.

The Court suggested that the determination of whether government interaction with religious bodies constitutes excessive entanglement requires an examination of three factors: first, “the character and purposes of the institutions that are benefited”; second, “the nature of the aid that the State provides”; and third, “the resulting relationship between the government and the religious authority.”¹⁸ Applying this analysis, the Court concluded that “the cumulative *impact* of the entire relationship arising under the statutes in [question] involves excessive entanglement between government and religion.”¹⁹

The Court recognized in *Lemon* that entanglement scrutiny was ultimately an *ad hoc* determination based “on all the circumstances of a particular relationship.”²⁰

14. *Id.*, at 674.

15. *Id.*

16. *Id.*, at 675, 680. However, the Court did make it clear that the taxation of religious institutions would necessarily require more entanglement than tax exemption. *Id.*, at 674-676.

17. 403 U.S. 602 (1971).

18. *Id.*, at 615.

19. *Id.*, at 614 (emphasis added). The entanglement test enunciated in *Lemon* is aimed at two separate evils: the evil of administrative entanglement, *id.*, at 615 (citing Harlan's concurring opinion in *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970)), and the evil of political divisiveness, 403 U.S. at 622. See Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS L.J. 205, 211 (1980). Administrative entanglement—where the state monitors or becomes involved in a religiously related activity—may lead to the invalidation of a relationship because such monitoring or involvement necessarily “creates an intimate and continuing relationship between church and state.” 403 U.S. at 622. Political divisiveness is a second ground for invalidating and prohibiting a given relationship between church and state under the *Lemon* test because, as Chief Justice Burger has declared, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.” *Id.*, at 622. The Chief Justice's assertion, however, appears to be lacking in historical accuracy. Gaffney, *supra* at 212-24. The Court has been called upon to abandon the political divisiveness doctrine because it is based on historical inaccuracy and bad public policy. (“It is time for the Court to abandon the political divisiveness test because the test is dysfunctional, illiberal, theologically unsound, constitutionally impermissible, and historically erroneous.”) Gaffney, *supra* at 236 and *passim*.

The statutes at issue in *Lemon* and the Court's treatment of the statutes are more fully explained in the text and notes at notes 15-112 *infra*.

20. 403 U.S. at 614.

The "substance" of the relationship, the Court pointed out, is crucial, with "form" only incidental:

This is not to suggest . . . that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.²¹

We believe that the reformulated test accomplishes this task, while the *Lemon* test as applied has not.

The Supreme Court's entanglement test, as developed in *Lemon*, apparently arose because the Court fears that any amount of entanglement—or more neutrally, contacts—between government and a religious organization is constitutionally suspect.²² The Court's apparent concern for the frequency of church-state contacts is appropriate since the frequency of actual, proposed, and threatened contacts is rapidly increasing. However, all of these contacts are not identical in nature; some are neutral, others hostile, still others benevolent, and so on. Additionally, the Supreme Court itself has acknowledged that "[s]ome relationship between government and religious organizations is inevitable."²³ In *Lemon* the Court admitted that its earlier holdings did "not call for total separation between church and state; total separation is not possible in an absolute sense."²⁴ When viewed in this light, the *Lemon* entanglement test, with its apparent concern over the quantity of church-state entanglement, is virtually meaningless because it fails to distinguish between permissible and impermissible contacts. Such a distinction is crucial since total separation is impossible. The ineffectiveness of the current entanglement test is evidenced by the uncertainty and confusion the test has created in the lower courts.

B. Lower Court Cases

If recitation by lower courts proves the value of a legal rule, then the entanglement test, as enunciated in *Lemon*, is priceless. The test has become almost like holy writ: ceremoniously invoked and fervently quoted, but seldom criticized. Nearly every court which has considered cases even remotely related to potential

21. *Id.*

22. In *Lemon* the Supreme Court spoke in terms of "comprehensive" and "enduring" entanglements:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike 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. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

403 U.S. at 619. Furthermore, the Court states that *Walz* calls for "close scrutiny of the degree of entanglement involved in the relationship." *Id.*, at 614. "The objective [of the entanglement scrutiny] is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Id.* The opinion appears to suggest that in terms of church-state entanglements, "fewer" is better and "many" is automatically suspect. See also the cases cited in note 33, *infra*.

23. 403 U.S. at 614.

24. *Id.*

entanglement has quoted the *Lemon* test verbatim.²⁵ While the lower courts have had little difficulty in quoting the *Lemon* test consistently, they have had increasingly more difficulty in *explaining* and *applying* it consistently to particular fact situations. Even more fundamental, the lower court opinions evidence an uncertainty as to *when* to use the entanglement test.²⁶

In attempting to apply the entanglement test, the lower courts have considered a wide variety of factors.²⁷ Although *Lemon* requires a broad evaluation, it has resulted in lower court holdings that are nearly as variable as the facts being considered. Indeed, the holdings of the lower courts appear so inherently inconsistent that opponents of the entanglement test have pointed out that the test is "not a test at all but a standardless mask disguising the real reasons why federal judges nullify controversial legislation."²⁸

The confusion and inconsistencies within the lower courts center around the question of what types of contacts between church and state constitute entanglement. While one federal district court has suggested that "purely clerical" contacts between church and state are acceptable,²⁹ another has held that excessive entanglement may result from the "mere inquiry" by the state "into the employment practices of an institution that comprises the very heart of religious propagation [a seminary]."³⁰ Yet a third federal district court compromised the two extremes by holding that court-supervised inquiries and contacts are permissible because courts can "restrain overly zealous" inquirers seeking extensive trial discovery.³¹

The lower courts are also uncertain about how to apply the Supreme Court's apparent concern over frequent and continuing entanglement.³² Some federal courts treat the number of contacts required in a given church-state relationship almost as if the sheer quantity of contacts presumptively satisfies the entanglement test.³³ Other courts note that even a minimal number of contacts will violate the First Amendment if they inhibit the free exercise of religion; those courts carefully

25. See, e.g., *American Motors Corp. v. Dept. of Industry, Labor and Human Relations*, 93 Wis.2d 14, 286 N.W.2d 847, 854 (1979); *Bonjour v. Bonjour*, 592 P.2d 1233, 1242 (Alaska 1979).

26. Compare *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (no violation of Establishment Clause) with *Rhode Island Federation of Teachers v. Norberg*, 479 F. Supp. 1364 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980) (violation of Establishment Clause); see text and notes at notes 36-49, *infra*.

27. See, e.g., *Gilfillan v. City of Philadelphia*, No. 79-2786 (Slip Opinion, 3rd Cir. Dec. 30, 1980); *Marshall v. Pacific Union Conference*, 21 FEP Cases 846, 848 (C.D. Cal. 1977); *EEOC v. Southwestern Baptist Theological Seminary*, 22 FEP 141, 485 F. Supp. 255 (N.D. Tex. 1980).

28. Gaffney, *supra* note 19, at 211.

29. *Wolman v. Essex*, 417 F. Supp. 1113, 1119 (S.D. Ohio 1976), *aff'd*, 444 U.S. 801 (1979).

30. *EEOC v. Southwestern Baptist Theological Seminary*, 22 FEP 141, 144, 485 F. Supp. 255 (N.D. Tex. 1980).

31. *EEOC v. Pacific Press Publishing Assn.*, 482 F. Supp. 1291, 1311 (N.D. Cal. 1979).

32. See note 22, *supra*.

33. See, e.g., *Gilfillan v. City of Philadelphia*, No. 79-2786 (Slip Opinion, 3rd Cir. Dec. 30, 1980) (entanglement resulting from numerous planning sessions involving church and governmental officials); *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (The amount and nature of contacts required by the statute at issue compared with the statutes in Supreme Court cases to determine if more or less entanglement was involved).

analyze the qualitative nature of church-state contacts.³⁴ Still another court suggests that even an analysis of both the frequency and the nature of the church-state contacts is insufficient. This court argues that courts must also consider the nature of the religious institution involved in the government contact because "[t]he risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious."³⁵

Because of the uncertainty and confusion surrounding the entanglement test, lower courts have abandoned attempts to decide cases by applying defined standards in favor of simple case-by-case fact comparison. As a result, they decide new questions which arise under the religion clauses by the degree of similarity to previously decided Supreme Court cases. As one court, troubled by the lack of "discernible consistency" in Establishment Clause cases, explained, the "emphasis on case as opposed to doctrinal analysis may seem somewhat simplistic, but due to the chaotic state of legal theory in this area of constitutional law, the court sees no other mode of examination which can reliably foretell the probable view of the Supreme Court."³⁶ This case-by-case fact comparison works when cases are factually similar to previously decided Supreme Court cases, but when new and different factual problems appear, the approach becomes difficult.³⁷

The uncertainty in the lower courts about the entanglement test naturally has produced diverse and often irreconcilable results. Results coincide in cases dealing with issues that the Supreme Court has already expressly addressed, such as the validity of property tax exemptions for religious bodies.³⁸ However, results diverge in cases that are dissimilar to the decided Supreme Court cases, such as the permissible extent of jurisdiction of various government agencies over religious bodies.³⁹ A review of some of the recent lower court decisions will illustrate this fact.

1. *Tax Exemption and Deduction Cases.* While courts agree that tax exemptions on religious property and income are constitutional,⁴⁰ they often disagree on the

34. See *Marshall v. Pacific Union Conference*, 21 FEP Cases 846 (C.D. Cal. 1977). The argument advanced by the court that even a small amount of contacts may violate the First Amendment is surely correct, for even a minimal amount of contacts may direct or influence religious activity. See text and notes at notes 95-104, *infra*.

35. *EEOC v. Southwestern Baptist Theological Seminary*, 22 FEP 141, 144, 485 F. Supp. 255, 260 (N.D. Tex. 1980).

36. *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316, 1320 (D. Minn. 1978).

37. Compare *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) *Petition for cert. filed sub nom. Lay Faculty Ass'n, Local 1261 v. Bishop Ford Central Catholic High School*, 49 U.S.L.W. 3496 (U.S. Dec. 22, 1980) (No. 80-1069) (following *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)) and *Filler v. Port Washington Union Free School District*, 436 F. Supp. 1231 (E.D. N.Y. 1977) (following *Wolman v. Walter*, 433 U.S. 229 (1977)) with *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) *vacating* 451 F. Supp. 564 (S.D. Miss. 1978) and *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) *rev'g* 460 F. Supp. 121 (D.P.R. 1978).

38. See note 40, *infra*.

39. See text and notes at notes 58-70, *infra*.

40. The Supreme Court's decision in *Waltz v. Tax Commission* to uphold and allow state (New York) property tax exemptions to religious organizations for buildings used for public worship has virtually eliminated any doubts as to the constitutionality of religious tax exemptions. The practice of granting tax exemptions for religious bodies has over 200 years of American history and tradition in its favor and is unquestionably the accepted and usual practice today as "[a]ll of the 50 states provide for tax exemption of places of worship, most of them doing so by constitutional guarantees." 397 U.S. at 676.

constitutionality of other types of favorable tax treatment for religious institutions.⁴¹ Two federal district court actions challenging state income tax deductions for school expenses exemplify the disparities in lower court holdings. In both *Minnesota Civil Liberties Union v. Roemer*⁴² and *Rhode Island Federation of Teachers v. Norberg*,⁴³ it was argued that the parents' deductions of their dependents' school tuition, transportation, and textbooks under state tax deduction statutes violated the First and Fourteenth Amendments⁴⁴ to the United States Constitution because such statutes primarily benefited parents whose children attended sectarian schools.⁴⁵ Even though the challenged statutes were identical⁴⁶ and the two district courts

41. See e.g., *Public Funds for Public Schools v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3rd Cir. 1979) (striking down N.J. statute granting deduction to parents of nonpublic schoolchildren); text and notes at notes 42-49 *infra*.

42. 452 F. Supp. 1316 (D.Minn. 1978).

43. 479 F. Supp. 1364 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980).

44. The First Amendment is made applicable to the states through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

45. Since the tax deduction was for expenditures on tuition, textbooks, and transportation, it would only benefit those parents whose dependents paid tuition and the other expenses. Since most students in public school pay no tuition and are furnished textbooks and transportation, the deduction essentially benefited only those parents with dependents in nonpublic schools—and nearly all of the nonpublic schools were sectarian. In Rhode Island, for example, it was found that "93.4% of the children attending school . . . whose parents are eligible for the challenged tuition deductions attend sectarian schools." 479 F. Supp. at 1366.

46. The two state statutes in question were virtually identical. The Rhode Island statute, R.I.G.L. § 44-30-12(c)(2), provided:

(c) Modifications Reducing Federal Adjusted Gross Income—There shall be subtracted from federal adjusted gross income . . . (2) amounts paid to others, not to exceed five hundred (\$500) dollars for each dependent in kindergarten through sixth grade and seven hundred (\$700) dollars for each dependent in grades seven through twelve inclusive, for tuition, textbooks, and transportation of each dependent attending an elementary or secondary school situated in Rhode Island, Massachusetts, Connecticut, Vermont, New Hampshire, or Maine, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964. As used in this section, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines, or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

479 F. Supp. at 1365. The Minnesota statute, Minn. Stat. § 290.09(22) (1976), provided:

Subdivision 1. Limitations. The following deductions from gross income shall be allowed in computing net income . . .

Subd. 22. Tuition and Transportation expense. The amount he has paid to others, not to exceed \$500 for each dependent in grades K to 6 and \$700 for each dependent in grades 7 to 12, for tuition, textbooks, and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines, or worship, the purpose of which is to inculcate such tenets, doctrines, or worship.

452 F. Supp. at 1317-1318.

relied on identical Supreme Court cases,⁴⁷ the district court in Rhode Island found its statute unconstitutional while the Minnesota court found its law constitutional.⁴⁸ Interestingly, the Rhode Island court emphasized the *Lemon* entanglement doctrine and found that the deduction could not be "policed without excessive government entanglement,"⁴⁹ while the Minnesota court virtually ignored the entanglement test.

A similar irreconcilable conflict of decisions illustrating the uncertain application of the entanglement test involves cases determining whether religious bodies and religiously affiliated organizations, such as church-operated schools, are exempt from state unemployment compensation taxes. These differ from the tuition deduction cases because they not only discuss whether religiously affiliated bodies *can* constitutionally be exempt, but they also discuss whether religiously affiliated bodies *must* be exempt.⁵⁰ Exemption is required, it is argued, because application of unemployment compensation laws to the employees of a religiously affiliated organization would result in considerable government interference and entanglement with the religious organization.⁵¹

In order to avoid the entanglement and other constitutional issues that arise when unemployment compensation statutes apply to church-operated schools, some courts have construed these statutes as exempting religiously affiliated schools.⁵²

47. Both cases cite and rely upon *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975).

48. 479 F. Supp. at 1372; 452 F. Supp. at 1322.

49. 479 F. Supp. at 1372. The difference in result may be partially due to the fact that the two courts chose dissimilar approaches to the issue—approaches that were probably suggested by the parties in each case. The Rhode Island court, however, was aware of the arguments advanced by the Minnesota court, as it cited the Minnesota decision, but refused to follow its holding and rejected any analogy to *Walz*. See 479 F. Supp. at 1370.

50. See, e.g., Brief for Petitioners, State of Alabama and State of Nevada at 30-43, *Alabama v. Marshall*, 626 F.2d 366 (5th Cir. 1980) *petition for cert. filed sub nom. Marshall v. Alabama*, 49 U.S.L.W. 3456 (U.S. Dec. 8, 1980) (No. 80-922).

51. "In order to comply with the Secretary's decision [not to exempt religious institutions from the Federal Unemployment Tax Act], church officials would be forced to assume extensive recordkeeping and reporting responsibilities with regard to church and school activities. State officials would be required to evaluate church school compliance with the regulatory scheme and to correct any perceived deviation therefrom through elaborate enforcement powers. Moreover, in ascertaining what services at church schools should be labeled (strictly church duties), and in conducting hearings into the propriety of a church school employee's termination of employment, state officials indisputably would be required to undertake religious-oriented inquiries. Petitioners submit that, under all the governing case authority, these inevitable consequences of the Secretary's decision would constitute excessive governmental entanglement with religious groups, in violation of the Religion Clauses of the First Amendment and, as applied to the states the Fourteenth Amendment." *Id.*, at 30.

52. *Durso & Brice, NLRB v. the Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedoms*, 24 ST. LOUIS U. L. REV. 295, 325 n.137 (1980) citing the following examples of courts striking down such taxes on religious schools: *Grace Brethren Church v. California*, No. CV 79-93 MRP (C.D. Cal. Sept. 21, 1979); *Trinity Evangelical Lutheran Church of the Unaltered Augsburg Confession v. Department of Indus. Rel. of Ala.*, CU 78-500325 MCR (Cir. Ct. Mobile Co., Ala. 1979); *Lutheran Church-Missouri Synod v. Bowling*, 89 Ill. App. 3d 100, 411 N.E.2d 526 (1980); *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Dept. of Labor*, 387 So. 2d 1248 (1st Cir. 1980); *Independent Baptist Church v. Tennessee*, No. 54227 (Chancery Ct., Hamilton Co., Tenn. March 23, 1979).

State unemployment compensation hearing officers in other states similarly have held that the state unemployment compensation schemes for which they are responsible do not apply to parochial schools.⁵³ The Department of Labor rejected such an approach with the Federal Unemployment Tax Act, however, and determined that the Federal Act "was clearly intended to result in State coverage of church-related schools."⁵⁴ Under this ruling, several states were held to be in nonconformity with the Federal Act because they refused to apply the unemployment compensation tax to church-operated schools.⁵⁵ Recently the Fifth Circuit Court of Appeals reversed holdings of nonconformity,⁵⁶ while the Supreme Court of South Dakota, finding no excessive entanglement, upheld them.⁵⁷ In resolving these conflicting opinions, the Supreme Court avoided the First Amendment issue. Instead, it held that as a matter of statutory interpretation parochial schools which have no legal existence apart from the church are exempt from unemployment taxes.⁵⁸

2. *Cases Involving Jurisdiction of Government Agencies over Religious Institutions.* The question of government agency jurisdiction and control over church-related institutions⁵⁹ is another hotly contested issue in the church-state legal arena which illustrates the confusion in the lower courts. Even though the Supreme Court has

53. Durso & Brice, *supra* note 52, citing *In Matter of Christian Day Schools of Wis. Evangelical Lutheran Synod*, Appeal No. C106-L-78 (79) (Minn. Dept. of Econ. Sec. Sept. 9, 1979); *Employment Division v. Archdiocese of Portland in Oregon*, 42 Or. App. 421, 600 P.2d 926 (1979); *St. Lucas Evangelical Lutheran School*, No. 21875 (Wis. Dept. of Industry, Labor and Human Rel. 1979).

54. Letter to the Most Reverend Thomas C. Kelly, General Secretary of the United States Catholic Conference from Ray Marshall, Secretary of Labor (April 18, 1978) quoted in *Independent Baptist Church v. Tennessee*, 468 F. Supp. 71, 74 (E.D. Tenn. 1978).

55. Under the Federal Unemployment Tax Act, "each state's unemployment statute is reviewed annually by the Secretary of Labor. States found to comply with the . . . FUTA are approved and thereafter certified by the Secretary. Since only payments made into a certified state fund entitle the payor to a reduction of FUTA liability, the state legislatures are provided strong incentive to conform their statutes to new FUTA requirements." Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues*, 25 VILL. L. REV. 69, 76 (1979) (footnotes omitted).

56. See *Alabama v. Marshall*, 626 F.2d 366 (5th Cir. 1980) petition for cert. filed sub nom. *Marshall v. Alabama*, 49 U.S.L.W. 3456 (U.S. Dec. 8, 1980) (No. 80-922).

57. In the *Matter of Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980), *rev'd sub nom. St. Martin Church v. South Dakota*, 49 U.S.L.W. 4575 (U.S. May 26, 1981) (No. 80-120).

Several other courts and administrative agencies have also taken positions on this issue. For example, a Pennsylvania state court recently held that religious schools are exempt from unemployment compensation, *Christian School Ass'n v. Comm., Dept. of Labor*, 423 A.2d 1340 (Pa. Comm. Ct. 1980), while a federal district court in North Carolina held that these schools are covered. *Ascension Lutheran Church v. Employment Security Comm.*, 501 F. Supp. 843 (W.D. N.C. 1980).

58. *St. Martin Church v. South Dakota*, 49 U.S.L.W. 4575 (U.S. May 26, 1981) (No. 80-120).

59. Stating the issue in terms of government agency jurisdiction, however, may often be somewhat misleading; since in many instances an even more fundamental question is whether the statutory scheme the government agency is seeking to enforce may constitutionally be made applicable to church-related institutions. For example, the question of whether the Equal Employment Opportunity Commission (EEOC) has jurisdiction or control over church-related institutions almost always arises in connection with the question of whether Title VII is intended to, or may constitutionally, apply to such institutions. See Comment, *Are Churches Above the Law? The Application of the Fair Labor Standards Act and the Equal Pay Provisions of Title VII to Religious Organizations*, 40 U. PITT. L. REV. 465 (1979); Comment, *King's Garden Inc. v. FCC: Loosening the Political Hands of Caesar*, 2 HASTINGS CONST. L.Q. 619 (1975); Note, *The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations*, 73 MICH. L. REV. 538 (1975); text and notes at notes 64-68, *infra*.

recently decided a case in this area—*NLRB v. Catholic Bishop of Chicago*⁶⁰—many of the questions pertaining to the jurisdiction of government agencies remain.

Cases involving jurisdiction by the National Labor Relations Board (NLRB)⁶¹ over religiously affiliated organizations where Congress has expressly intended such jurisdiction⁶² are prime candidates for entanglement evaluation. To date, however, the NLRB has ignored claims of potential impermissible entanglement resulting from its jurisdiction. For example in asserting its jurisdiction over a health care institution operated by the Seventh Day Adventists, the NLRB refused even to consider the First Amendment arguments raised by the Adventists, saying that First Amendment issues were for court resolution.⁶³ Similarly, it has ignored First Amendment arguments opposing its jurisdiction over hospitals and social service groups owned and operated by the Roman Catholic Church.⁶⁴ Because of the NLRB's previous non-treatment of First Amendment issues, at least one federal court of appeals has ordered the NLRB to address its jurisdiction "in light of the Supreme Court's opinion in *Catholic Bishop*"⁶⁵ whenever its asserted jurisdiction raises First Amendment objections. The NLRB's purported "past insensitivity to first amendment concerns and . . . lack of ability to deal with first amendment

60. 440 U.S. 490 (1979). The *Catholic Bishop of Chicago* case involved the refusal of Catholic schools in Chicago and in Indiana to bargain collectively with associations of lay teachers employed at various seminaries and diocesan high schools. After the associations were certified as the exclusive representatives of the faculties at the schools and the schools continued their refusal to bargain, the associations filed unfair labor practices charges with the National Labor Relations Board (NLRB). The NLRB found the Catholic dioceses that operated the schools to be in violation of federal law for refusing to bargain with certified bargaining representatives. The NLRB's decision was challenged by the diocese and was reversed by the Seventh Circuit Court of Appeals, which held that NLRB jurisdiction over the schools in question violated the religion clauses of the First Amendment. The Supreme Court affirmed the Seventh Circuit's result, but on different grounds: the Court found no Congressional intention to grant NLRB jurisdiction over church-operated schools and therefore, refused to construe the National Labor Relations Act to provide for jurisdiction over such schools. By construing the Act as not providing for jurisdiction, the Court found it unnecessary to resolve the "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 440 U.S. at 507. Although the Court avoided the First Amendment questions, the clear implication is that were the Court to have considered the matter it would have found the NLRB's action unconstitutional. See Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149, 161-62 (1980).

The narrowness of the Court's holding in *Catholic Bishop of Chicago* does not allow the case to shed much light on the entanglement test or the test's application to future cases involving regulatory schemes and church-related institutions. In fact, the decision does not even provide guidance on other jurisdictional powers claimed by the NLRB that are subject to challenge under the First Amendment. In *Mid-American Health Services, Inc.*, 103 L.R.R.M. 1234 (1980), the NLRB's asserted jurisdiction over a health care institution operated by the Seventh Day Adventists, for example, was found not to fall within the *Catholic Bishop of Chicago* decision because "a clearly manifested congressional intent to grant NLRB jurisdiction" was found. Durso & Brice, *supra* note 52, at 314 & n. 84.

61. The NLRB was created and given authority under the Connery-Wagner Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1976).

62. Expressed Congressional intention to grant NLRB jurisdiction is necessary to bring any case beyond the threshold question and holding of *Catholic Bishop of Chicago*. See note 60, *supra*.

63. *Mid-American Health Services, Inc.*, 103 L.R.R.M. 1234, 1235 (1980).

64. See *Bon Secours Hospital Inc.*, 248 N.L.R.B. No. 19 (March 4, 1980); *Catholic Community Services*, 247 N.L.R.B. No. 103 (Feb. 1, 1980).

65. *St. Elizabeth Community Hospital v. NLRB*, 626 F.2d 123, 125 (9th Cir. 1980). For a summary of the *Catholic Bishop* decision, see note 60, *supra*.

issues,"⁶⁶ will undoubtedly result in an increasingly large number of federal court challenges to asserted NLRB jurisdiction.

The application of Title VII of the Civil Rights Act⁶⁷ and Equal Employment Opportunity Commission (EEOC) regulations to religious institutions also illustrates the uncertain and unsettled use of the entanglement test. While one court has held that the EEOC has jurisdiction to rectify alleged sex discrimination involving an unmarried, pregnant teacher at a Roman Catholic high school,⁶⁸ another has held that the EEOC does not even have jurisdiction to investigate or issue subpoenas to gather information with respect to alleged employment discrimination involving a female professor at a Baptist college.⁶⁹ Similarly, one federal district court has held that the EEOC can exercise jurisdiction over allegations of employment discrimination against a Seventh Day Adventist publishing affiliate,⁷⁰ while another court has held that any attempt by the EEOC to enforce any portion of Title VII against a Baptist seminary would violate the First Amendment.⁷¹ This confusing array of precedents can provide little, if any, assistance to a court considering the application of Title VII or EEOC regulations to a religious institution.

III

TOWARD A USEFUL ENTANGLEMENT TEST

A. *Bases for the Test*

It is both interesting and revealing to note that since the Supreme Court's announcement of the entanglement doctrine in *Walz* and *Lemon*, the Court has ignored the doctrine in deciding numerous First Amendment religion clause cases,⁷² including cases concerning state aid to parochial school students,⁷³ church property disputes,⁷⁴ nonpublic school tuition reimbursements and tuition tax credits,⁷⁵ and the application of compulsory school attendance laws to a long-standing, religiously-

66. Durso & Brice, *supra* note 52, at 314.

67. The Civil Rights Act, Title VII, 42 U.S.C. §§ 2000e-2000e-17 prohibits an employer from discriminating against any individual, on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

68. *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980).

69. *EEOC v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978). The decision was subsequently vacated, however, by the Fifth Circuit Court of Appeals which held that the EEOC could investigate sex or race discrimination by religious institutions but not discrimination based on religion. 626 F.2d 477 (5th Cir. 1980).

70. *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291 (N.D. Cal. 1979).

71. *EEOC v. Southwestern Baptist Theological Seminary*, 22 FEP 141, 485 F. Supp. 255 (N.D. Tex. 1980).

72. The Court did use the entanglement doctrine in *Hunt v. McNair*, 413 U.S. 734 (1973), in which it upheld the use of state bonds to finance a building which the state would convey to a Baptist College after the Baptist College had repaid the bonds.

73. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).

74. *Jones v. Wolf*, 443 U.S. 595 (1979).

75. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

based tradition of in-home education.⁷⁶ The Court's treatment of the entanglement doctrine clearly shows that the doctrine cannot, and indeed should not, be the only test or basis available for deciding a First Amendment religion clause case. Like most other legal theories, the entanglement doctrine has limited applicability. The test may be important in some cases but useless in others. Thus, the challenge becomes not only formulating and applying an effective entanglement test but determining the cases in which the test is useful.

As a beginning, the entanglement test obviously is for difficult cases. Some forms of government action so clearly establish or inhibit religion that courts can strike them down without close scrutiny; one does not need a microscope to see an elephant. Surely it takes no lengthy examination of facts and theories to find that legal inquiry into the truth or falsity of religious beliefs⁷⁷ or state interference with a church's internal dispute over religious doctrine, in the form of civil adjudication,⁷⁸ directs and influences religious activity. The entanglement test is useless when government action so obviously directs or interferes with religious activities.

On the other hand, many church-state contacts do not obviously establish or inhibit religion. A time release program for religious study⁷⁹ or a government study of the costs of private schools⁸⁰ are examples of church-state relationships that require some contact but do not obviously establish or inhibit religion. Furthermore, anytime government regulates religious institutions some entanglement arises; even fire codes and building or zoning regulations create some church-state contacts. No one would argue that *all* such contacts are impermissible under the First Amendment. A properly formulated entanglement test should analyze and distinguish what the Supreme Court has called "necessary and permissible contacts" from contacts that give rise to "excessive entanglement."⁸¹

Aside from its usefulness in deciding difficult Establishment Clause cases, the entanglement test is also particularly helpful in Free Exercise clause cases. Although the test originated in Establishment Clause cases,⁸² it probably applies even more forcefully to the Free Exercise clause, because government contact often inhibits religion rather than establishes it. The test's usefulness in Free Exercise clause questions arises because, as the Court noted in *Walz*, it primarily responds to the First Amendment prohibition of both "governmental evaluation" of religious practices⁸³ and "extensive state investigation into church operation and finances."⁸⁴ Moreover, as the *Lemon* Court explained, "[t]he objective is to prevent, as far as

76. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

77. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

78. *See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976).

79. *See Lanner v. Wimmer*, 463 F. Supp. 867 (D. Utah 1978).

80. *See Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) *rev'd* 460 F. Supp. 121 (D.P.R. 1978).

81. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

82. Both *Walz v. Tax Commission* and *Lemon v. Kurtzman* were decided under the Establishment Clause.

83. *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

84. *Id.*, at 691 (Brennan, J., concurring).

possible, the intrusion of either [church or state] into the precincts of the other.”⁸⁵ These explanations verify that the entanglement test becomes most useful in cases involving either government investigation or government regulation of religious institutions which might infringe upon the free exercise of religion. Establishment Clause ramifications remain under the entanglement doctrine, however, because contacts that inhibit or interfere with the programs and policies of religious institutions may really direct religious activity into governmentally selected channels.

B. *Factors in a Proposed Entanglement Test*

An effective and useful entanglement test should first determine whether the activity that the government contacts touch upon is religious or nonreligious. Only when the activity is religious does entanglement become a concern. If the activity is religious, the courts must evaluate the frequency and the effect of the contacts to determine whether they direct or influence religious matters. Those that do not direct or influence religious matters are neutral and may be permitted. If the contacts direct or influence religious matters, the courts must review the nature of the government interest in creating the contacts to determine whether the government has a compelling interest that justifies the contacts.

1. *The Nature of the Religious Activity.* Religious institutions engage in a wide variety of activities ranging from obviously religious liturgical celebrations and education of clergy to the performance of otherwise nonreligious tasks, such as sponsoring an athletic league or selling books, which may nonetheless be religiously motivated and inspired. This wide variety of activities tempts one to analyze religious activities and institutions based on the *degree* of religiosity and to argue that the more religious the activity, the more protected it becomes. But such an approach is fatally flawed: for just as courts in the free speech context are unable to define a continuum of speech and must therefore categorize activities as “speech,” “speech plus” and “conduct,”⁸⁶ it is often impossible in the religious context to define a continuum of religious activity and to place the activity in question correctly on the continuum. The real key to an effective entanglement test, like the First Amendment speech tests generally, should depend less on calibrating the degree of religiosity than on distinguishing religious from nonreligious activity.

Therefore, under an entanglement test, courts first should determine whether an activity is “religious” or “nonreligious.” In making such a determination, they should acknowledge that they may not be in the best position to classify activities as “religious” or “nonreligious”; the institutions themselves are in the best position to advance and support an assertion of religiosity or nonreligiosity.⁸⁷ The institutions

85. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

86. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (affixing peace symbol to flag is speech); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (wearing black armbands as a war protest is speech); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card is conduct); *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (picketing is speech plus).

87. The Supreme Court's most recent decision in the First Amendment religion clause area,

have overwhelming incentives to assert their status accurately since classification as religious or nonreligious will impact upon numerous aspects of their operation, including government support, subsidies, regulation, tax status, and so on. Also, some activities may be religious for one denomination, but not religious for another, as validly held religious beliefs will differ from group to group.⁸⁸ Therefore, courts need not establish rigid rules and distinctions in an attempt to classify activities. For the purposes of applying the entanglement doctrine, the assertion by a religious institution that the activity in question is religious in character ordinarily should suffice. There are existing legal tools to deal with spurious assertions and asserted religious practices that conflict with public health and safety.⁸⁹ To force full litigation in every case would burden both the parties and the judicial system unnecessarily, and would lead to artificial and rigid classifications of "religious" and "nonreligious" activity.

There will, of course, be ambiguous and fuzzy areas near the border of the religious-nonreligious distinction, just as there are in the speech-conduct distinction.⁹⁰ Especially difficult are cases involving activities that are religious in some situations but nonreligious in others. For example, although a church may operate a hospital or social service agency as a religious activity, others can conduct such operations as nonreligious activities or even for profit. Courts should treat cases

Thomas v. Review Board, 101 S. Ct. 1425 (1981), emphasizes that the issue of what is "religious" does "not turn upon judicial perception" of asserted religious beliefs or practices:

The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

101 S. Ct. at 1430 (footnote omitted).

88. In *Thomas v. Review Board*, 101 S. Ct. 1425 (1981), the United States Supreme Court held that the Indiana Supreme Court had erred in denying unemployment benefits to a worker, Eddie Thomas, who quit his job for religious reasons. Thomas was originally working in a roll foundry but when the foundry was closed, he was transferred to a department that produced turrets for military tanks. Thomas, a Jehovah's Witness, objected, on religious grounds, to participation in the production of military weapons and machinery. With the closing of the roll foundry, however, Thomas' employer no longer had any departments that were not engaged directly in the production of military weapons. Thomas quit and applied for unemployment benefits. The Indiana Supreme Court denied unemployment benefits to Thomas, relying in part on the fact that there were other Jehovah's Witnesses working at the plant that did not find the work objectionable. The United States Supreme Court rejected such an approach and noted that validly held religious beliefs will differ even among persons within the same religious organization. "[T]he judicial process," the Chief Justice argued, "is singularly ill equipped to resolve such differences. . . ." 101 S. Ct. at 1431. If the courts must recognize that validly held religious beliefs will differ among individuals within the same religious organization, then *a fortiori* the courts cannot dispute that validly held religious beliefs will differ from organization to organization.

89. See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976). The law can also deal with spurious claims and practices that conflict with public health and safety. See e.g., *Town v. State ex rel. Reno*, 377 S.2d 648 (Fla. 1979), *cert. denied*, 101 S. Ct. 48 (1980).

90. Close cases can prove to be most difficult. Compare *Brown v. Louisiana*, 383 U.S. 131 (1966) (demonstration is speech) and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (demonstration held to be "an exercise of . . . basic constitutional [First Amendment] rights in their most pristine and classic form") with *Cox v. Louisiana*, 379 U.S. 559 (1965) (demonstration is speech plus) and *Adderly v. Florida*, 385 U.S. 39 (1966) (demonstration is conduct).

where it is unclear if an activity is religious or nonreligious protectively, just as they do in the fuzzy cases in the speech-conduct area. Thus, borderline activities deserve protection because it is better to err in favor of First Amendment rights than to err in favor of encroachment on such rights.⁹¹

2. *The Frequency and Effect of the Contacts.* Only after determining that the activity in question is religious should courts consider the frequency and effect of the contacts. If the activity is not religious, the frequency and effect of the contacts is irrelevant because there can be no entanglement.

To determine whether the contacts direct or influence religion, courts must look at how the contacts will affect the religious organization. It could be argued that any contacts that cause the organization to do something it would not otherwise have done impermissibly direct and influence religious matters. But almost any contact would cause the organization to alter its conduct. Even relatively neutral contacts such as fire inspections would also change the organization's behavior, as in the case where an organization might be required to buy new electrical wiring for the church. Indeed, it is hard to imagine a government contact that would not, in some fashion, alter the behavior of an organization. Such changes in behavior, by themselves, are not the subject of First Amendment scrutiny.

Instead, courts should focus on whether the change in the organization's behavior affects its religious beliefs or practices. Fire inspections usually do not affect religious beliefs or practices, because unsafe electrical wiring (even in a church) is not ordinarily a part of an organization's religious concerns. But an EEOC requirement that a Catholic school retain an unmarried pregnant teacher surely interferes with religion. In such a situation, the government is requiring a religious group to keep a person in a role model position who has obviously violated the group's belief against premarital sex. This is the kind of contact that directs or influences religious activities.

Some contacts will appear to be neutral but will not be neutral in effect because of frequent or regular occurrences. One inspection of a church's employment records will probably not affect religious belief or practice. But regular inspections or audits of a religious institution's financial or employment records with no apparent direction would produce "a kind of continuing day-to-day relationship" that would significantly interfere with "the desired insulation and separation"⁹² of church and state. Such regular inspections would cause churches (or any other employer) to adjust their inspected records and their financial and employment practices themselves, to suit the inspector's biases. Depending on the specific target of the investigations, they may affect religious doctrine and practice. Churches may cease hiring those who can best further the churches' religious beliefs, and instead

91. See e.g., *Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966).

92. *Walz v. Tax Commission*, 397 U.S. 664, 674, 675 (1970).

hire those whom the inspectors favor. The repetitive character of the contacts ultimately changes the religious practices of the group.

But frequency alone is, again, not determinative. For example, the numerous contacts between church and state leaders necessary for the formulation of plans to provide security and crowd control during a visit of a prominent church official will probably have no effect on religious activity,⁹³ but one single civil adjudication of a church doctrinal controversy will profoundly alter the religious activities of at least one party to the controversy.⁹⁴ Thus, *both* the frequency and the effect of church-state contacts must be simultaneously considered.

Virtually all of the reported lower court cases could have benefited from a consideration of the frequency and effect of contacts. Extensive and regular government investigations into church finances or church activities through inspection of church documents, records and publications, for example, create a large number of contacts that necessarily cause the religious institutions to change their practices to conform more to the wishes of the inspector than the wishes of the religion.⁹⁵ Application of NLRB regulations to religious institutions creates a large number of contacts,⁹⁶ which may or may not impermissibly direct or influence religious activity, depending on the activity involved.⁹⁷ EEOC regulation of religious institutions also creates many contacts which might not be neutral.⁹⁸ The application of state unemployment taxation schemes to religious institutions will create different kinds of contacts depending on the nature of the scheme. If the scheme only requires a payment of a tax, then it creates few, relatively neutral contacts, although taxation creates more contacts than does exemption.⁹⁹ If the scheme involves a determination of whether a discharge was justified and requires employment reinstatement, then it generates more instances of potentially non-neutral contacts since it is dictating employment practices.¹⁰⁰

93. *But see* Gilfillan v. City of Philadelphia, No. 79-2786 (Slip Opinion, 3d Cir. Dec. 30, 1980).

94. *See, e.g.,* Serbian Eastern Orthodox Diocese v. Milivojevic, 426 U.S. 696 (1976).

95. *See* United States v. Holmes, 614 F.2d 985 (5th Cir. 1980); Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979), *rev'g* 460 F. Supp. 121 (D.P.R. 1978).

96. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds* 440 U.S. 490 (1979).

97. For example, asserted NLRB jurisdiction over unionization and collective bargaining by seminary teachers at a church seminary would probably be more likely to direct or influence religious affairs than would NLRB jurisdiction over unionization and collective bargaining by the physical plant personnel at the same seminary.

98. Neutrality will often depend upon the nature of the religious institution. *Compare* EEOC v. Southwestern Baptist Theological Seminary, 22 FEP 141, 485 F. Supp. 255 (N.D. Tex. 1980) (application of EEOC regulations to a seminary) *with* EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979) (application of EEOC regulations to a church affiliated publishing corporation).

99. *See* Walz v. Tax Commission, 397 U.S. 664, 674-76 (1970).

100. Under some state statutes, "the state unemployment boards are required to oversee and intervene in the day-to-day operations of the [parochial] schools." Comment, *supra* note 55, at 116. This intervention is in the form of determining "what percentage of employment is 'secular' and covered by the law, versus what portion is excluded as being sufficiently 'religious,'" and in determining "whether the decision to fire or leave was justified under the 'good cause' standard." *Id.*, at 116, 117 (footnotes omitted).

3. *The Governmental Interest Served.* If the activity that the government touches is religious and the contacts direct or influence religious activity, then the courts must examine the government interest served in creating the contacts. This examination is unnecessary if the activity is nonreligious, because then entanglement is not a concern. It is also unnecessary if the contacts do not direct or influence religious activities, because then the contacts are neutral. In either event, the government interest is not relevant because such contacts are permissible. But the presence of religious activity plus impact from the state contact requires courts to review the government interest.

An effective entanglement test must consider the importance of the government interest being served in the particular church-state entanglement.¹⁰¹ This is especially true because of the diversity of today's range of government activity and interests. They include everything from national defense and public safety to the conversion of football to meterball. Although the distinctions are hard to make, some governmental interests are surely more important than others. Thus, the government's interest in public safety might prevail over the asserted religious activity of using poisonous smoke at religious services;¹⁰² but the government's interest in regulating and monitoring labor disputes among teachers in seminaries might have to yield to the religious organization's right to "establish [its] own rules and regulations for internal discipline and government."¹⁰³

Two Supreme Court decisions under the Free Exercise Clause illustrate the process of identifying the government interest in specific church-state relationships. In *Wisconsin v. Yoder*,¹⁰⁴ members of the Old Order Amish religion challenged Wisconsin's compulsory school attendance laws, arguing that such laws inhibited the practice of their long-held religious tradition of in-home education. The Supreme Court held that Wisconsin could compel school attendance only if the compulsion did "not deny the free exercise of religious belief by its requirement, or that there is a state of interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."¹⁰⁵ According to the Court, the state interest in compulsory education stemmed from a desire to help students become self-sufficient and to prepare citizens for meaningful participation in the state and community. The Court found these interests valid, but insufficiently compelling to justify the encroachment on the claimants' free exercise of religious beliefs.¹⁰⁶

In *Sherbert v. Verner*,¹⁰⁷ the Supreme Court similarly analyzed the government

101. Explicit consideration of whether state action is prompted by a compelling government interest is not new to the Religion Clauses, see *Wisconsin v. Yoder*, 406 U.S. 205, 219-34 (1972), nor to the First Amendment speech and press clauses, see text and notes at notes 104-106, *infra*.

102. See *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1979), *cert. denied*, 101 S. Ct. 48 (1980) (use of cannabis as part of religious service enjoined).

103. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976). See *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979).

104. 406 U.S. 205 (1972).

105. *Id.*, at 214.

106. *Id.*, at 224-25, 228-29.

107. 374 U.S. 398 (1963).

interest in a South Carolina unemployment compensation scheme. Sherbert had been denied unemployment compensation because she refused, on religious grounds, to accept employment that required her to work on Saturday. The Court found that there was no "compelling state interest" that justified the burden placed on the free exercise of religion in such a disqualification.

Weighing the government interest to determine whether the church-state contacts are permissible is a long-established, well-accepted practice in First Amendment litigation. The Supreme Court, in *Smith v. Daily Mail Publishing Co.*, recently reaffirmed the long-recognized principle that the government may encroach upon the fundamental protection of speech guaranteed by the First Amendment only to protect the most compelling of government interests.¹⁰⁸ This case is just one link in a long line of cases holding that any time the government seeks to limit or abridge First Amendment freedoms by statute, it must construct the statute narrowly to reflect only the compelling government interest.¹⁰⁹

The entanglement test should expressly incorporate the weighing of the government interest, because the weighing allows a sliding standard. A compelling government interest may justify some contacts, while the absence of a compelling government interest should prohibit contacts that direct or influence religious activities.

C. Remedies

Impermissible church-state contacts demand remedies. Prohibiting the contacts or the relationship giving rise to them is the most obvious remedy. But complex relationships, especially those created by general regulatory schemes, necessitate a range of remedies to deal with widely varying situations. The range of possible remedies should include (1) prohibiting the relationship altogether, (2) permitting the relationship and dealing with the contacts on a case-by-case basis, and (3) altering an aspect of the relationship to circumscribe or neutralize the contacts.

1. *Prohibiting the Relationships.* Currently, prohibition of a given church-state relationship is the most frequently invoked remedy for violations of the entanglement doctrine and, indeed, under all other First Amendment religion clause doctrines. The Supreme Court applied this remedy in *Lemon v. Kurtzman* and in

108. 433 U.S. 97 (1979).

109. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Bridges v. California*, 314 U.S. 252 (1941). Whether or not a compelling government interest will justify a departure from "the desired isolation and separation," see *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970), of church and state depends upon several factors, including, whether, on the whole, the government interest can be protected without interfering with the separation of church and state. The burden is on the government to show that there are no less entangling alternatives available to protect the government interests. See *Talley v. California*, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring); *Thornhill v. Alabama*, 310 U.S. 88, 104-105 (1940); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 917-18 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

several subsequent decisions.¹¹⁰ *Lemon* involved two different state statutes: a Rhode Island statute that paid salary supplements to teachers of secular subjects in nonpublic elementary schools, and a Pennsylvania statute that reimbursed nonpublic schools for teachers' salaries, textbooks, and other instructional materials in specified secular subjects. The Supreme Court held that "the cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion," and prohibited the contacts *in toto* by nullifying each statute in its entirety.¹¹¹

2. *Permitting the Relationship and Dealing with Contacts on a Case-by-Case Basis.* It may not always be possible—or desirable—to prohibit completely contacts that constitute "excessive entanglement" under the entanglement test. In fact, some contacts will be permissible in some situations but will be overreaching and impermissible in other situations.¹¹² As to these contacts, the logical remedy is to permit the relationship giving rise to the contacts but to limit or proscribe the contacts, as necessary, on a case-by-case basis.

The Supreme Court's treatment of church property disputes illustrates the efficacy of generally allowing a particular church-state relationship but proscribing the overreaching contacts that arise in individual situations. The law allows civil courts to adjudicate such disputes but prohibits them from doing so when the adjudication requires them to resolve religious issues. For example, *Serbian Eastern Orthodox Diocese v. Milivojevic*¹¹³ involved a dispute over control of a diocese in the Serbian Orthodox Church that ultimately led to the Church's defrockment of a bishop. The defrocked bishop sued in a state court to have himself declared the true bishop of the diocese and to enjoin the new bishop from interfering with Church assets. While the Supreme Court accepted the general proposition that civil courts can resolve church property disputes, it nonetheless declared that "where resolution of the [church] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity."¹¹⁴ The Court thus distinguished between "disputes over church property as such, and . . . religious disputes that only 'incidentally' affect church property or other secular matters"¹¹⁵ and held that

110. See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

111. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 625 (1971). This same approach was also taken by the Seventh Circuit in *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979).

112. *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976), as discussed in text and notes at notes 113-116, *infra*, is a good example of such a situation.

113. 426 U.S. 696 (1976).

114. *Id.*, at 709. See also *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *TRIBE, supra*, note 7, § 14-12 at 877-78.

115. *TRIBE, supra* note 7, § 14-12 at 879, *citing* 426 U.S. at 709, 720-23.

the Illinois Supreme Court had erred by intermeddling with the church's "internal discipline and government."¹¹⁶

3. *Circumscribing or Neutralizing the Contacts.* Depending on the frequency and nature of the contacts, courts can restructure the contacts in order to neutralize their adverse effect. If total neutralization is impossible, restructuring may nonetheless minimize the negative and restrictive effect of the contacts.

A recent Court of Appeals decision, *United States v. Holmes*,¹¹⁷ shows the usefulness and practicality of this remedy. In that case, the bishop and director of a church appealed a summons the IRS issued in order to establish the church's entitlement to tax exempt status. The summons asked the church to give the IRS "all documents relating to the organizational structure of the church since its inception; all correspondence files for the [relevant] period . . . ; the minutes of all meetings of the officers, directors, trustees or *ministers*, during this same interval; and a sample of *every* piece of literature pertaining to the Church."¹¹⁸ The court had little difficulty in finding that the summons was "too far-reaching" and vacated a district court's enforcement order.¹¹⁹ While the tax exemption provided under the Internal Revenue Code for religious organizations¹²⁰ necessarily creates some church-state contacts in the assessment of the validity of a particular church's exemption, the determination does not require the examination and review of every church document, record, and publication. The remedy of restructuring entangling church-state contacts, such as those resulting from the broad summons at issue in *United States v. Holmes*, is essential to our system of government where some contacts are permissible and necessary but others are not.

IV

THE LOWER COURT CASES REVISITED: APPLYING THE REFORMULATED TEST

In the application of the proposed entanglement test to the cases that follow, a caveat must be repeated. The entanglement test does not purport to address every possible First Amendment issue. Many church-state relationships, such as the school aid package in *Lemon*, for example, must also be evaluated in terms of whether they "advance religion" or have a "secular purpose."¹²¹ Furthermore, even though a particular church-state relationship contains no entanglement problems, it may nonetheless raise other First Amendment issues. The analysis here ignores all but the entanglement issues.

The question of NLRB jurisdiction over religious institutions illustrates the use of the proposed entanglement test. Under the proposed test, one must first deter-

116. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

117. 614 F.2d 985 (5th Cir. 1980).

118. *Id.*, at 988.

119. *Id.*

120. 26 U.S.C. § 501(c)(3).

121. See *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education v. Allen*, 392 U.S. 236 (1968).

mine whether the activity over which the NLRB is claiming jurisdiction is religious. This depends, in part, upon whether the religious organization properly considers and claims it to be religious. If the activity is religious, then the relationship created by NLRB jurisdiction should be reviewed to determine whether it directs or influences religion.

The National Labor Relations Act¹²² imposes a wide range of duties on the institutions under NLRB jurisdiction and empowers the NLRB to determine whether the institutions have properly discharged those duties.¹²³ For example, there are established procedures for the selection of union representatives and standards governing collective bargaining.¹²⁴ The Board has broad powers to investigate all aspects of the employment relationship to determine if these requirements have been fulfilled and will adjudicate alleged violations and other unfair labor practices.¹²⁵ Not only does the Board carry on its functions through formal proceedings, but it also directs and influences labor relations through the daily interplay of the Board agent, union representatives, and the employer. The relationship between the NLRB and the institutions subject to its jurisdiction thus touches on, and tends to direct, every aspect of the employment relationship.

These numerous and far-reaching contacts necessarily result in a "continuing day-to-day relationship"¹²⁶ between the NLRB and the religious institution. As a result of NLRB jurisdiction, the religious institutions would have to change their labor practices to accord with the voluminous NLRB rules and procedures. A religiously affiliated school, for example, could no longer deal with its employees in light of its religious message. Instead it would have to follow the rules and procedures developed by the NLRB, even though religious beliefs played no part in their development. Not only would the religious institution's procedures be changed, but the NLRB procedures are also likely to control the institution's personnel decisions. Instead of being able to promote a person on the basis of a strong religious orientation, the institution may find that as a result of the "good faith bargaining" procedures mandated by the NLRB, it could only promote those with the most seniority. By affecting a religious organization's employment procedures and decisions, the NLRB would interfere with the institution's religious practices and goals.

Since NLRB jurisdiction directs and influences religion, it is only permissible if supported by a compelling government interest which overcomes the religious organization's right to establish and govern its own religious practices. Here the government's interest is based on a desire to minimize labor disputes in order to insure the free flow of commerce. The religious organization's interest is based on the First Amendment guarantee of freedom of religion. If the government's

122. 29 U.S.C. §§ 151-169 (1976). The Act, as enacted, was originally entitled the Connery-Wagner Labor Relations Act of 1935.

123. See 29 U.S.C. §§ 158-161. See also *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979).

124. See 29 U.S.C. §§ 158-161. Institutions under NLRB jurisdiction must also comply with an ever increasing body of law embodied in regulations and court decisions.

125. See 29 U.S.C. §§ 160-161.

126. *Walx v. Tax Commission*, 397 U.S. 664, 674 (1970).

interest prevails, the organization will not be able to exercise its religious beliefs freely. However, if the religious organization prevails, commerce will still continue. When this major loss of First Amendment rights is weighed against such a slight infringement, if any, upon commerce, the First Amendment rights must prevail.

Because NLRB jurisdiction results in a large number of inherently non-neutral contacts and because these contacts lack a compelling government interest, the fundamental question in the NLRB cases is whether the activity that would be subject to NLRB jurisdiction is religious. If the activity is religious, only prohibition of NLRB jurisdiction avoids entanglement because there is no method of restructuring the contacts to avoid interference with religious matters. If the activity is non-religious, then no entanglement arises.

EEOC jurisdiction over religious institutions and the application of Title VII to such institutions are similar, yet more troublesome, problems. Title VII specifically exempts every "religious corporation, association, educational institution or society."¹²⁷ But courts are confused as to the meaning and application of this exemption, with some courts all but ignoring the exemption in applying Title VII to religious institutions.¹²⁸ It could be argued that under the *Catholic Bishop of Chicago* reasoning,¹²⁹ courts should not apply Title VII to religious institutions because of the "absence of a clear expression of Congress' intent to bring" religious institutions under Title VII coverage.¹³⁰ But assuming, as most courts have, that Congress intended Title VII, as presently codified, to apply to religious institutions, then the proposed entanglement test can effectively analyze such an application.

EEOC jurisdiction over religious institutions creates both permissible and impermissible contacts. For example, a religious institution violates the equal pay provisions of the Civil Rights Acts when it has male and female clerks or laborers doing substantially the same type and quantity of work, but does not provide equal salaries. EEOC enforcement of the equal pay provisions in such a situation probably does not involve a religious activity and therefore creates little risk of influencing religious matters. On the other hand, EEOC investigation into the propriety of discharging religious employees, such as parochial school teachers, for violating church doctrines and standards more clearly involves religious issues.

The crucial question to be asked in Title VII cases, therefore, is whether the activity in question is religious. If the activity is religious, EEOC regulation of it will direct and influence the religion. When a district court holds that the dismissal of an unmarried pregnant parochial school teacher is sex discrimination,¹³¹ for exam-

127. 42 U.S.C. § 2000e-1. The exemption, in its entirety reads, "This subchapter shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

128. Most courts have read the exemption to allow religious employers to discriminate on the basis of religion, but not allow religious employers to discriminate on the basis of sex or national origin. See *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980).

129. See note 60 *supra*.

130. See note 60 *supra*.

131. The fact that parochial school teachers are involved in religious activity is beyond any serious

ple, the state is essentially determining either that the religious doctrines and standards regarding morality are erroneous,¹³² or that the state, not the church, must be the source of such doctrines and standards. Both of these determinations are prohibited by the First Amendment.¹³³ Similarly, EEOC or Title VII regulation of the employment of ministers¹³⁴ or seminary teachers¹³⁵ by a church clearly interferes with the religion. As the Fifth Circuit Court of Appeals has noted, "an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment, and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of Church and State contemplated by the First Amendment."¹³⁶ Courts cannot allow Title VII regulation of these employment relationships because the state may not regulate internal church administration and government.¹³⁷

Because the Title VII church-state contacts will touch religion in some situations, but avoid it in others, courts should allow the contacts generally, but they should review and circumscribe them, as necessary, on a case-by-case basis to ensure that they do not touch upon religious matters. The case-by-case review must prohibit Title VII regulation that touches upon religious doctrine or interferes with church administration and government.¹³⁸ The proposed entanglement test can also be evaluated by applying it to the issue, recently considered by the Seventh Circuit Court of Appeals, of whether participation by religious institutions in job training and employment programs under the Comprehensive Employment and Training Act (CETA)¹³⁹ constitutes excessive entanglement.¹⁴⁰

Those challenging the program argued that when the government scrutinized CETA financing to insure that CETA funds were actually spent on government

doubt. The Supreme Court has held that "parochial schools involve substantial religious activity and purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). The Court has repeatedly found that such schools are substantially religious, see *Meek v. Pittenger*, 421 U.S. 349, 366 (1975), and pervasively sectarian, see *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973).

132. But see *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980).

133. See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1979); *United States v. Ballard*, 322 U.S. 78 (1944).

134. See *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972).

135. See *EEOC v. Southwestern Baptist Theological Seminary*, 22 FEP 141, 485 F. Supp. 255 (N.D. Tex. 1980).

136. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.), cert. denied, 409 U.S. 896 (1972).

137. See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 708, 724 (1976) ("The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions. . . ." "[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government. . . ."); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.), cert. denied, 409 U.S. 896 (1972) ("[T]he application of . . . Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.")

138. See cases cited in note 137 *supra*.

139. Pub. L. No. 93-203, 87 Stat. 839 as amended by Pub. L. No. 95-524 (1978).

140. *Decker v. O'Donnell*, No. 80-1230 (Slip Opinion 7th Cir. Sept. 9, 1980).

programs and not diverted to other activities, excessive entanglement resulted. But this argument assumes that government scrutiny, by itself, constitutes excessive entanglement and ignores the nature of the activity that is the object of the scrutiny. Since participation by church-affiliated organizations in CETA or other social welfare programs involves government activity, and not religious activity, one never gets beyond the first factor in the proposed test. Job training by religious institutions under CETA is not a religious activity because the institutions are simply carrying out forms of government activity. CETA is a governmentally defined and sponsored program that does not involve religious activity. By its very nature, it is "free from religious content" and is "strictly non-sectarian in nature."¹⁴¹

Thus, any amount of auditing or scrutiny of the spending of government funds by religious institutions on CETA or other government programs does not constitute excessive entanglement because religious activity is not involved. Of course, the case would be different if the government aided and then audited religious programs rather than used religious institutions to carry out government programs. The line between these two scenarios is admittedly fine, but CETA seems quite clearly to fall on the "government activity" side of the line.

V

CONCLUSION

History and experience teach us that in spite of the First Amendment's objective "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other," "[s]ome relationship between government and religious organizations is inevitable."¹⁴² An effective entanglement test, therefore, must distinguish so-called "necessary and permissible contacts" from "excessive entanglement."¹⁴³ Simply looking at the sheer quantity and quality of contacts is ineffectual because not all contacts direct or influence religious activity and compelling government interests might justify even those that do.

We propose an entanglement test that will direct courts to the functional issues under the religion clauses of the First Amendment. The test expressly incorporates established First Amendment doctrines, such as the distinctions between "protected" and "unprotected" activities and the requirement that a government interest be

141. Department of Labor Field memorandum No. 450-79 (Sept. 17, 1979). In this context, it is interesting to note that Justice Douglas, one of the staunchest opponents of aid to parochial schools, suggested that "[t]he government may, of course, finance a hospital though it is run by a religious order, provided it is open to people of all races and creeds. . . . The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran the hospitals were Catholics, Methodists, agnostics, or whatnot. For the hospital is not indulging in religious instruction or guidance or indoctrination." *Lemon v. Kurtzman*, 403 U.S. 602, 633 (1971) (Douglas, J., concurring) (citation omitted). *But see* *Decker v. United States Dept. of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979), *modified*, 485 F. Supp. 837 (E.D. Wis. 1980), *aff'd sub nom.* *Decker v. O'Donnell*, no. 80-1230 (Slip Opinion 7th Cir. Sept. 9, 1980), wherein it was held that the use of CETA funds to employ and train various staff members at sectarian schools in Wisconsin led to excessive government entanglement with religion and was, therefore, violative of the First Amendment.

142. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

143. *Id.*

"compelling" in order to justify even the slightest encroachment on First Amendment protections. The proposed test first asks whether the activity involved in the contacts is religious. If the activity is religious, it examines the frequency and character of the contacts to determine whether the contacts direct or influence religious activity. Contacts that do not direct or influence religious activity are neutral and may be permitted. If the contacts direct or influence religious activity, it examines the government interest served by the contacts. Only where there is a compelling government interest are such contacts permissible.

This factor analysis should identify church-state contacts that support or interfere with religious activities and institutions in such a way as to direct or influence religious matters. Such contacts require either complete prohibition or prohibition on a case-by-case basis or restructuring. Conversely, the test will also identify neutral contacts, those that do not direct or influence religious activities, and contacts that do not touch upon religious activities at all. Truly limited and neutral contacts of this sort are "necessary and permissible contacts"¹⁴⁴ and are not prohibited by the First Amendment.

The Supreme Court, in *Walz v. Tax Commission*, recognized that "[s]eparation [of church and state] . . . cannot mean absence of all contact; the complexities of modern life inevitably produce some contact. . . ."¹⁴⁵ But even with this reality in mind, "the objective" of the First Amendment nonetheless remains "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."¹⁴⁶ We believe that the entanglement test as announced in *Walz* and *Lemon*, and as applied by the courts, has failed to set a standard by which permissible and impermissible contacts may be distinguished. It is hoped that the test proposed here will advance the development of such a standard.

144. *Id.*

145. *Walz v. Tax Commission*, 397 U.S. 644, 676 (1970).

146. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).