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THE *LEMON* TEST AND THE ESTABLISHMENT CLAUSE: A PROPOSAL FOR MODIFICATION

I. INTRODUCTION

The separation of church and state, as contemplated by the First Amendment,¹ has given rise to a troubling line of cases interpreting the Establishment Clause.² In 1971, the United States Supreme Court fashioned a test for deciding these cases in *Lemon v. Kurtzman*.³ Previous Establishment Clause holdings⁴ were synthesized into a three-pronged analysis. "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citation omitted).⁵ An act which fails to satisfy any of the three prongs violates the Estab-

1. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. These cases require a judicial assessment as to whether a particular legislation or ruling advances religious doctrine or institutions, thereby "respecting an establishment of religion."

There is an inherent tension between the Establishment Clause and the Free Exercise Clause. An act may pursue neutrality so aggressively under the former that free exercise rights under the latter are compromised.

3. 403 U.S. 602 (1971).

4. The legislative purpose and primary effect prongs of the test were derived from *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The government entanglement prong was first enunciated in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *Lemon* and its authorities are fully discussed in § II, *infra*, notes 10-34.

5. *Lemon*, 403 U.S. at 612-613. This is the first statement by the Court of these three elements in a single, seemingly coherent test. The test's apparent simplicity makes it immediately attractive as a practical judicial tool. It will be shown, however, that this apparent practicality has proven illusory.

lishment Clause.⁶

In practical application, this test has been the source of a great deal of confusion,⁷ yielding what one writer has termed "a conceptual disaster area."⁸ This comment will show that the first or "purpose" prong is the source of much of the confusion. Accordingly, the purpose prong should be abandoned, as its limited utility is greatly outweighed by the problems it creates.⁹

II. *LEMON V. KURTZMAN*

In *Lemon*, Rhode Island's Salary Supplement Act¹⁰ authorized a maximum fifteen percent salary supplement to teachers of secular subjects in nonpublic elementary schools. The lower court found that approximately twenty-five percent of the State's pupils attended non-public schools; ninety-five percent of these schools were parochial Roman Catholic.¹¹ As of the trial date, all 250 teachers who had applied for benefits under the act were employees of the Roman Catholic church.¹² The District

6. *Edwards v. Aguillard* 107 S. Ct. 2573, 2577 (1987)(discussed fully in § III, *infra*, notes 35-62).

7. See § VI, *infra*, notes 63-87. The confusion which the *Lemon* test has created in the courts is persistent and receives recurring attention by the legal press. See, e.g., Reidinger, *Trends in the Law: What is Establishment?*, 75 A.B.A.J. 100 (1989); Reidinger, *Trends in the Law: Exercised About Religion*, 75 A.B.A.J. 81 (Dec. 1989).

8. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 Calif. L. Rev. 5,6 (1987). The author surveyed the Court's application of the *Lemon* test, and found the distinctions necessary to reconcile the inconsistencies among the opinions virtually imperceptible. *Id.* at 6,7.

9. The suggestion that the purpose prong of the *Lemon* test be eliminated is not original. See Comment, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: A Case for Abandoning the Purpose Prong*, 76 Ky. L.J. 1061 (1988)(Abandoning the purpose prong would allow the Court to reach substantive questions and would "provide a more objective and consistent analysis for deciding establishment clause cases." *Id.* at 1075); See also Comment, *Balanced Treatment of Creation and Evolution: A Study in Reconciling the Two Religion Clauses*, 34 Wayne L. Rev. 263 (1987)(Suggesting that inquiry into legislative intent is irrelevant in that it "adds nothing to the constitutional analysis since the concern of the establishment clause is whether a statute in fact advances or inhibits religion, not merely whether it was intended to do so." *Id.* at 301).

10. R.I. PEN. LAWS ANN. § 16-51-1. The law made no distinction between parochial and non-parochial private schools, but merely provided the subsidy to any facility where the per-pupil expenditure was less than the public school average.

11. *Lemon* 403 U.S. at 608.

12. *Id.*

Court concluded that the Act created excessive government entanglement with religion.¹³

A Pennsylvania statute,¹⁴ similar to the Rhode Island law, was also analyzed by the *Lemon* court.¹⁵ Nonpublic schools were reimbursed for expenditures on secular education, and were required to account separately for such expenses.¹⁶ The statistics were similar to those in Rhode Island: twenty percent of the State's pupils attended nonpublic schools, of which ninety-six percent were religiously affiliated.¹⁷

Before turning its focus to these statutes, the Supreme Court fashioned its test, relying heavily on two earlier opinions, *Board of Education v. Allen*¹⁸ and *Walz v. Tax Commission*.¹⁹ In *Allen*, the Court was asked to examine a New York statute which required local authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in private schools.²⁰ The Court found nothing in the record revealing a legislative intent to advance or prohibit religion, and the effects of the statute were consistent with its stated secular purpose.²¹ The "purpose and primary effect"²² focus in *Allen* be-

13. *Id.* at 609. The law required the Commissioner of Education to review the financial data submitted by schools whose teachers applied for the subsidy. The Commissioner would then determine if the expenditures fell below the public school average, and if not, what percentage of the expenditures went to secular education. Because all of the recipients to date were Roman Catholic teachers, this scrutiny amounted to excessive governmental entanglement with religion.

14. PA. STAT. ANN., tit. 24 § 5601-5608 (Supp. 1971). The principle difference from the Rhode Island statute is that under the Pennsylvania law, private schools were reimbursed for expenditures on secular subjects, whereas Rhode Island subsidized the salaries of teachers of secular subjects. In Pennsylvania a teacher's salary could be partially subsidized proportional to the secular content of the curriculum; in Rhode Island any religious content would render a teacher ineligible for the subsidy.

15. 403 U.S. at 609-611.

16. *Id.* at 610.

17. Of the religiously affiliated schools, the majority were Roman Catholic. *Id.*

18. 392 U.S. 236 (1968).

19. 397 U.S. 664 (1970).

20. N.Y. EDUC. LAW § 701 (1967 Supp.) The statute authorized the loan of textbooks for use in secular subjects only. The selection of these textbooks was subject to the approval of the public school authorities. No religious textbooks were loaned.

21. *Allen*, 392 U.S. at 243. Although the *Allen* court passed on purpose and effect separately, purpose was given cursory treatment. The Court was willing to accept the legislature's express purpose because it was consistent with the act's effect. Thus, the *Allen* court paved the way for later decisions which would either accept a mere recital of secular purpose or examine effect in order to assess purpose.

22. *Id.*

came the purpose and primary effect prongs of the *Lemon* test.²³

In *Walz*, a realty owner sought an injunction preventing the New York City Tax Commission from granting property tax exemptions for facilities used solely for religious purposes.²⁴ The state constitutional provision²⁵ allowing for the deduction was found not to establish, sponsor or support religion.²⁶ The Court called for close scrutiny of the degree of governmental involvement in religious activities and institutions.²⁷ The *Walz* court's focus on governmental involvement was adopted in *Lemon* as the "entanglement" prong.²⁸

After discussing *Walz* and *Allen*, the Court turned its attention to the statutes at issue by focusing on the entanglement prong.²⁹ Rhode Island's authority to examine school records to determine the amount of secular-related expense was held to be "fraught with the sort of entanglement that the constitution forbids."³⁰ The similar power granted by the Pennsylvania statute was found to "create[] an intimate and continuing relationship between church and state."³¹ Accordingly, both Acts were held unconstitutional.³²

23. *Lemon* 403 U.S. at 612 (citing *Allen*, 392 U.S. at 243).

24. 397 U.S. at 666. *Walz* argued that the property tax exemption forced him to indirectly support religious institutions in violation of the First Amendment. The opinion does not elaborate, but this support presumably came in the form of the religious organizations' receipt of tax-funded municipal services.

25. N.Y. CONST. art. 16, § 1.

26. *Walz*, 397 U.S. at 672-74. The court found that the New York statute did not favor any single faith, and furthered the state's interest in the "moral or mental improvement" of its citizens.

27. *Id.* at 674. Chief Justice Burger, writing for the court, recognized that some governmental involvement with religion is inevitable, i.e. taxation and exemption. The dividing line is crossed when this involvement becomes "excessive." Unfortunately, little guidance is offered as to the parameters of excessiveness, which may account for some of the resulting confusion when the term was incorporated into later decisions.

28. *Lemon*, 403 U.S. at 613 (citing *Walz*, 397 U.S. at 674).

29. *Id.* at 620.

30. *Id.* at 621. The Court, as it had in *Allen*, accepted the legislature's stated purpose on face value in the absence of evidence contradictory to that purpose. In *Allen*, however, a secular purpose was found because nothing about its effects appeared non-secular. Had the same reasoning been applied in *Lemon*, the opposite may have resulted: Nearly all of the aid bestowed by both programs was received by Roman Catholic parochial schools. Had the *Lemon* court chosen to assess purpose through effect, both programs may have failed the purpose prong. However, the Court's discussion of effect in *Lemon* was subsumed under the entanglement prong.

31. *Id.* at 622.

32. *Id.* at 625.

On its face, the *Lemon* test represented the clearest statement thus far of Establishment Clause doctrine.³³ Chief Justice Burger, however, offered a disclaimer to any notion that Establishment Clause “confusion” was ending: “Judicial caveats against entanglement must recognize that the line of separation, far from being a ‘wall’, is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.”³⁴

III. EDWARDS V. AQUILLARD

The Court made fullest use to date of *Lemon*'s purpose prong in 1987 in *Edwards v. Aguillard*,³⁵ assessing the constitutionality of a Louisiana statute.³⁶ *Edwards* provides strong support for eliminating *Lemon*'s purpose prong. Louisiana's “Balanced Treatment for Creation-Science and Evolution-Science Act”³⁷ does not mandate the teaching of either creationism or evolutionary theory.³⁸ If one theory is taught, however, the other must be given equal treatment in the curriculum.³⁹

33. *Lemon* represents the first attempt to synthesize earlier doctrine, but as will be shown, *infra*, this synthesis misstates the basis of the doctrine.

34. *Id.* at 614.

35. 107 S. Ct. 2573 (1987).

36. LA. REV. STAT. ANN. § 17:286.1-17:286.7 (West 1982).

37. *Id.*

38. *Id.* § 286.5 of the Act provides:

This Subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of evolution-science and creation-science) if public schools choose to teach either. This Subpart does not require each individual textbook or library book to give balanced treatment to the models of evolution-science and creation-science; it does not require any school books to be discarded. This Subpart does not require each individual classroom lecture in a course to give such balanced treatment but simply permits the lectures as a whole to give balanced treatment; it permits some lectures to present evolution-science and other lectures to present creation-science.

39. *Id.* § 286.4(A) “Authorization for balanced treatment”:

Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent

Plaintiffs were parents of school children, teachers, and religious leaders.⁴⁰ All sought to enjoin implementation of the act as a violation of the First Amendment.⁴¹ The District Court granted summary judgment for plaintiffs.⁴²

The court of appeals rejected defendants' argument that the legislature's expressed secular purpose was controlling.⁴³ Defendants' petition for rehearing was denied.⁴⁴

Justice Brennan found the act unconstitutional on its face,⁴⁵ "[P]etitioners have identified no *clear* secular purpose for the Louisiana Act."⁴⁶ The stated "purpose" of promoting academic

that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.

40. *Edwards*, 107 S. Ct. at 2576. Among the plaintiffs were the Louisiana Board of Elementary and Secondary Education, and the Orleans Parish School Board, originally defendants, but later realigned in opposition to the Act. *Id.*, note 1.

41. *Aguillard v. Treen*, 634 F. Supp. 426 (La. 1985). Plaintiffs argued that no material issue of fact existed, and that the Act violated the Establishment Clause as a matter of law. *Id.* at 427.

42. *Id.* The court rejected defendants' argument that a material issue existed over the definition of "science":

We decline the invitation to judge that debate. Whatever "science" may be, "creation," as the term is used in the statute, involves religion, and the teaching of "creation-science" and "creationism," as contemplated by the statute, involves teaching "tailored to the principles" of a particular religious sect or group of sects. *Epperson v. Arkansas*, 393 U.S. 97, 106, 89 S. Ct. 266, 271, 21 L.Ed.2d 228 (1968). As it is ordinarily understood, the term "creation" means the bringing into existence of mankind and of the universe and implies a divine creator. *Id.* at 427-428.

43. *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985). The court found that the Act:

[a]lthough purporting to promote academic freedom, the Act does not and cannot, in reality, serve that purpose. . . it requires, presumably upon risk of *sanction* or *dismissal* for failure to comply, the teaching of creation-science whenever evolution is taught. . . . [T]he compulsion inherent in the Balanced Treatment Act is, on its face, inconsistent with the idea of academic freedom as it is universally understood.

Id.

44. 778 F.2d 225 (5th Cir. 1985).

45. *Edwards*, 107 S. Ct. at 2575.

46. *Id.* at 2578. (emphasis added). By this, the court obviously meant that petitioners were unable to show that the stated purpose of the Act is "clearly" genuine. The stated purpose *is* clear: to promote academic freedom. LA. REV. STAT. ANN. § 17:286.2

freedom was inconsistent with the Act's primary effect of promoting a particular religious belief.⁴⁷ Provisions of the Act protected teachers who were "creation scientists" and provided research services to them, without making similar provisions for those espousing evolutionary theory.⁴⁸ This effectively gave "creation-science" curriculum a practical advantage.⁴⁹ The Court then looked to the legislative history in order to probe beyond the stated secular purpose.⁵⁰ The belief that humankind was created by a supernatural being was found to be a central tenet of those responsible for the bill.⁵¹ The legislative intent, therefore,

(West 1982). Unfortunately for the sponsors, a "paper trail" was left in the legislative history which pointed to their religious motives. It is doubtful that such carelessness will occur in the future. See *infra* note 58 and accompanying text.

47. *Edwards*, 107 S.Ct. at 2582. The Court once again examined "purpose" through "effect", an indirect way of getting at the true issue: *purpose*. If the effects of an act indicate an unconstitutional purpose, then the effects are likely to be unconstitutional in themselves.

48. § 286.4(C) protected teachers of creation-science:

No teacher in public elementary or secondary school or instructor in any state supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism shall, for that reason, be discriminated in any way by any school board, college board or administrator.

No parallel safeguards were provided to teachers espousing evolution-science. Further, § 286.7(A) of the Act provided that "Each city and parish school board shall develop and provide to each public classroom teacher in the system a curriculum guide on presentation of creation-science." Thus, the act required assistance and guidance in creation-science instruction while giving no aid to evolution-science. Finally, § 286.7(B) provided:

The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request. Each such creation-scientist shall be designated from among the full-time faculty members in any college and university in Louisiana. These creation-scientists shall serve at the pleasure of the governor and without compensation.

No such panel was mandated to develop evolutionary curriculum guides.

49. The Court agreed "with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creation science. . . .'" *Edwards*, 107 S.Ct. at 2580.

50. *Id.* at 2581. The majority made a thorough examination of the debate and testimony surrounding passage of the bill. This represents the best possible method for truly determining an acts "purpose" and yet, as the dissent points out, *infra* at notes 56-58, this method is unreliable.

51. The Court noted:

The sponsor of the Creationism Act, Senator Keith, explained during the legislative hearings that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs. According to

“was to restructure the science curriculum to conform to a particular religious viewpoint.”⁵²

Justice Powell, joined by Justice O'Connor, filed a concurring opinion also finding the legislative history had refuted the Act's stated secular purpose.⁵³ “The tenets of creation-science parallel the Genesis story of creation, and this is a religious belief.”⁵⁴

Justice White concurred separately on the basis that the lower court's interpretation should be given deference in the absence of any indication of error.⁵⁵

Justice Scalia's dissent, joined by Chief Justice Rehnquist, attacked the majority's application of the purpose prong of *Lemon*, as well as the viability of the prong itself.⁵⁶ Finding that some indication of religious purpose is permissible, Scalia asserted “[t]he majority's invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana Legislature had *no* secular purpose.”⁵⁷

Senator Keith, the theory of evolution was consonant with the 'cardinal principle[s] of religious humanism, secular humanism, theological liberalism, atheism [sic].'

Id. at 2582.

52. *Id.*

53. The key witness testifying in support of the Act, Dr. Edward Bourdeaux, noted that recognized creation-scientists were “affiliated with either or both the Institute for Creation Research and the Creation Research Society.” 107 S. Ct. at 2587. The Court discovered that the former was founded “to address the ‘urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account.’” *Id.* Members of the Creation Research Society had to “subscribe to the following statement of belief: ‘The Bible is the written word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true.’” *Id.*

54. *Id.* at 2588.

55. Justice White found that “both courts construed the statutory words ‘creation science’ to refer to a religious belief,” and noted that the Court normally accepts a rational construction of a state statute by a court of appeals. *Id.* at 2590-91.

56. *Id.* at 2593.

57. *Id.* at 2594. [emphasis in original.] Justice Scalia's opinion further serves to illustrate the ineffectiveness of the purpose prong as an analytical device: “Our cases have also confirmed that when the *Lemon* court referred to ‘a secular. . . purpose,’ it meant ‘a secular purpose.’” *Id.* at 2593. [emphasis in original.] This implies that secular purpose is a minimum standard, one easily met. It is not a great leap, conceptually, from a secular purpose to *any* secular purpose. By this reasoning, courts are invited to search the outer reaches of possible legislative motives, and an act passed almost entirely for religious purposes would still be constitutional if some hint of secular purpose were imaginable.

The dissent concluded by calling into question the efficacy of relying upon legislative histories which “are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and post enactment recollections conveniently distorted.”⁵⁸

Although it makes the fullest⁵⁹ use of the purpose prong to date, *Edwards* would have been more correctly⁶⁰ decided under an effects analysis.⁶¹ The Court’s detailed investigation into legislative history could have been sidestepped by focussing first on effects, a better choice given the pitfalls of determining legislative intent. The effect of *Edwards* on the *Lemon* test may be to invite fuller use of the purpose prong. This is unfortunate, as the purpose prong adds nothing to Establishment Clause analysis and “is difficult to apply and yields unprincipled results”.⁶²

IV. THE PURPOSE PRONG’S SHAKY FOUNDATION

As noted by Justice Scalia, the purpose prong of *Lemon* has received cursory treatment by the Court since its inception.⁶³ This highlights the prong’s limited utility, and suggests that it may indeed add little to Establishment Clause analysis.⁶⁴

The purpose prong is more apparent than real.⁶⁵ This be-

58. *Id.* at 2606. According to the dissent, legislative histories, inadequate as they are, are the only means available for the purpose. Beyond this, “discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.” *Id.* at 2605. Justice Scalia would place purpose prong analysis in the realm of guesswork.

59. *Edwards* represents the most detailed discussion and analysis by the Court of *Lemon*’s purpose prong, and demonstrates the lengths to which the Court can and will go to ascertain the purpose behind an act. This repudiates the Court’s prior practice of summary treatment of purpose prong issues, noted in Justice Scalia’s dissent, “typically devoting no more than a sentence or two to the matter.” *Id.* at 2593.

60. The result in *Edwards* may be correct, but it is best defended in light of what the Balanced Treatment Act would have achieved: an academic environment favorable to creationism while hostile to other theories.

61. The practical advantages and protections (discussed *supra* note 48) which the Act gave to creationism had the effect of advancing this religious doctrine. No further analysis is necessary to find a violation of the establishment clause.

62. *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985)(Rehnquist, C.J., dissenting).

63. *Edwards* 107 S. Ct. at 2593. See *supra* note 57.

64. *Id.* at 2605.

65. Purpose prong analysis is almost always, theoretically and practically, an indi-

comes clear upon examining the confusing authority upon which it is based. In its first enunciation of the test,⁶⁶ the *Lemon* Court cites *Board of Education v. Allen*, *supra*, as authority for the purpose and primary effect prongs. In *Allen*, secular purpose is found to exist because, “[a]ppellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose.”⁶⁷ The secular purpose analysis in *Allen* focuses almost exclusively on the effects of the act in question.⁶⁸ Thus, the purpose prong was without a clearly defined criteria at its inception.

Allen, in turn, relied upon *Abington Township School District v. Schempp*,⁶⁹ the earliest express statement of an Establishment Clause test: “The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. 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.”⁷⁰ *Abington* involved two cases challenging statutorily mandated Bible readings at the beginning of the school day in Pennsylvania⁷¹ and Maryland⁷² public schools. The Court summarily disposed of the acts’ purposes by noting their effect: “But even if [the state’s] purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible.”⁷³ These readings are the effects of the statutes as implemented, and not the purpose underlying their enactment.

The *Abington* test, *supra*, cited two earlier opinions, *Everson v. Board of Education*⁷⁴ and *McGowan v. Maryland*.⁷⁵ *Everson* involved a New Jersey statute which provided for reim-

rect method of assessing an Act’s primary effects.

66. 403 U.S. at 613.

67. *Allen*, 392 U.S. at 243.

68. *Id.* at 244.

69. 374 U.S. 203 (1963).

70. *Id.* at 222.

71. 24 PA. STAT. § 15-1516 (Supp. 1960).

72. MD. ANN. CODE art. 77 § 202 (1957).

73. *Abington*, 374 U.S. at 224.

74. 330 U.S. 1 (1947).

75. 366 U.S. 420 (1961).

bursement to parents for the costs of sending their children to school on public transportation.⁷⁶ Some of these children attended Catholic parochial schools.⁷⁷ The Court's focus was exclusively on effect: "The 'establishment of religion' clause means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief in any religion."⁷⁸ There is no concern with the purpose behind any of these impermissible results. The Court examined the effect of the statute and found that paying for busing properly furthered the educational program of New Jersey, and the incidental effect of aiding parochial students did not violate the Establishment Clause.⁷⁹ Cited to support the "purpose and primary effect" test in *Abington*,⁸⁰ *Everson* is actually only authority for the effect prong. In reality, the purpose prong was spontaneously created in *Abington*.

In *McGowan*, Maryland's Sunday Closing Laws⁸¹ were challenged.⁸² The Court cited *Everson* for its "purpose and effect" test,⁸³ *Everson* and *McGowan* were later cited in *Abington*.⁸⁴ Recognizing the religious purpose behind the Act's antecedents,⁸⁵ the Court held that the present effect of creating a uniform day of rest for Maryland's citizens rendered it permissible under the Establishment Clause.⁸⁶

Language in *McGowan* indicates a blurring between the purpose and effect inquiries which was to recur in subsequent debate. "[E]vidence of religious *purpose*. . . may be gleaned from the face of the present statute *and from its operative*

76. N.J. REV. STAT. § 18:14-8 (1941).

77. *Everson*, 330 U.S. at 3.

78. *Id.* at 15.

79. *Id.* at 17.

80. 374 U.S. at 222.

81. MD. ANN. CODE art. 27 § 521 (1957).

82. *McGowan*, 366 U.S. at 422. Defendants had been indicted for selling a loose-leaf binder, a can of floor wax, a stapler and staples and a toy submarine, on Sunday.

83. *Id.* at 443.

84. *Id.* at 443-45.

85. *Id.* at 446.

86. 366 U.S. at 449.

effect.”⁸⁷

The opinions from which the *Lemon* test was derived focused their primary attention on the effects of challenged acts. When purpose was discussed, it was given minimal treatment and usually tested by analyzing an act's effects. Such problems are characteristic of later applications of *Lemon's* purpose prong. This may indicate that such difficulties are inherent to this type of inquiry.

The purpose prong's ineffectiveness is further highlighted by asking what evils it might realistically be expected to prevent. It is difficult to imagine a legislative body, possessing impermissibly religious motives, enacting a law with a patently religious preamble and no impermissible effect. As absurd as such a scenario seems, it may be one of the few instances where the purpose prong would have real utility.

V. THE RESULTING CONFUSION

Although it is generally included as an element of the test whenever *Lemon* is cited, the purpose prong is rarely invoked to dispose of an issue. A reading of forty⁸⁸ state court opinions cit-

87. *Id.* at 445 (emphasis added).

88. *Cortez v. Independence Co.*, 287 Ark. 279, 698 S.W.2d 291 (1985), *Walker v. Superior Ct.*, 47 Cal. 3d 112, 253 Cal. Rptr. 1 (1988), *Wollersheim v. Church of Scientology of Cal.*, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989), *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 254 Cal. Rptr. 915 (1989), *Jimmy Swaggert Ministries v. Board of Equalization of State of Cal.*, 204 Cal. App. 3d 1269, 250 Cal. Rptr. 891 (1988), *Perumal v. Saddleback Valley Unified School Dist.*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988), *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987), *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987), *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984), *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1982), *Young Life v. Division of Employment and Training*, 650 P.2d 515 (Colo. 1982), *McDonnell v. Episcopal Diocese of Ga.*, 191 Ga. App. 174, 381 S.E.2d 126 (1989), *Koolau Baptist Church v. Department of Labor and Indus. Relations*, 68 Haw. 410, 718 P.2d 267 (1986), *Gregersen v. Blume*, 113 Idaho 220, 743 P.2d 88 (1987), *Pre-School Owners Ass'n of Ill. v. Department of Children and Family Serv.*, 119 Ill. 2d 268, 518 N.E.2d 1018 (1988), *In re Marriage of Tiscos*, 161 Ill. App. 3d 302, 514 N.E.2d 523 (1987), *Zucco v. Garrett*, 150 Ill. App. 3d 146, 501 N.E.2d 373 (1986), *Heckman v. Cemeteries Ass'n of Greater Chicago*, 127 Ill. App. 3d 451, 468 N.E.2d 1354 (1984), *Terpstra v. State*, 529 N.E.2d 839 (Ind. App. 1988), *Farris v. Minit Mart Foods, Inc.* No. 37, 684 S.W.2d 845 (Ky. 1984), *Baltimore Lutheran High School Ass'n, Inc. v. Employment Sec. Admin.*, 302 Md. 649, 490 A.2d 701 (1985), *Taunton Eastern Little League v. City of*

ing *Lemon* yields seventeen⁸⁹ which separately discuss purpose. Within this group, secular purpose analysis is unnecessary to the resolution of the Establishment Clause issues in question, and produces confusing and inconsistent results. A few examples will illustrate this.

A common problem in purpose prong analysis is resorting to an examination of effects in order to test the constitutionality of purpose. In *Heckman v. Cemeteries Ass'n of Chicago*,⁹⁰ cemetery union members challenged a statute⁹¹ allowing certain burials on Sunday and legal holidays. A secular purpose was found

Taunton, 389 Mass. 719, 452 N.E.2d 211 (1983), *Sheridan Rd. Baptist Church v. Department of Educ.*, 426 Mich. 462, 396 N.W.2d 373 (1986), *McLeod v. Providence Christian School*, 160 Mich. 333, 408 N.W. 146 (1987), *Matter of Minneapolis Community Dev. Agency*, 439 N.W.2d 708 (Minn. 1989), *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988), *Pruey v. Department of Alcoholic Beverage Control of N.M.*, 104 N.M. 10, 715 P.2d 458 (1986), *Board of Educ. of MonroeWoodbury Cent. School Dist. v. Wieder*, 132 A.D. 2d 409, 522 N.Y.S.2d 878 (N.Y.App.Div. 1987), *Smith v. Community Bd. No.14*, 128 Misc.2d 944, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *Kay by Disselbrett v. David Douglas School Dist. No. 40*, 79 Or. App. 384, 719 P.2d 875 (1986), *Salem College and Academy, Inc. v. Employment Div.*, 61 Or. App. 616, 659 P.2d 415 (1983), *Bishop Carroll High School v. Commonwealth, Unemployment Bd. of Review*, 557 A.2d 1141 (Pa. Commw. Ct. 1989), *Pennsylvania State Univ. v. Commonwealth, Pa. Human Relations Comm'n*, 95 Pa. Commw. 388, 505 A.2d 1053 (1986), *Covenant Community Church v. Lowe*, 698 S.W.2d 339 (Tenn. 1985), *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692 (Tex. 1984), *Bullock v. Texas Monthly, Inc.*, 731 S.W.2d 160 (Tex. Ct. App. 1987), *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989), *State ex. rel. Boyles v. Whatcom County Superior Court*, 103 Wash. 2d 610, 694 P.2d 27 (1985), *Witters v. State Comm'n for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wash. App. 690, 723 P.2d 483 (1986).

89. *Cortez v. Independence Co.*, 287 Ark. 279, 698 S.W.2d 291 (1985) *Walker v. Superior Ct.*, 47 Cal. 3d 112, 253 Cal. Rptr. 1 (1988), *Perumal v. Saddleback Valley Unified School Dist.*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988), *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987), *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984), *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1982), *Young Life v. Division of Employment and Training*, 650 P.2d 515 (Colo. 1982), *Pre-School Owners Ass'n of Ill. v. Department of Children and Family Serv.*, 119 Ill. 2d 268, 518 N.E.2d 1018 (1988), *Zucco v. Garrett*, 150 Ill. App. 3d 146, 501 N.E.2d 373 (1986), *Heckman v. Cemeteries Ass'n of Greater Chicago*, 127 Ill. App. 3d 451, 468 N.E.2d 1354 (1984), *Taunton Eastern Little League v. City of Taunton*, 389 Mass. 719, 452 N.E.2d 211 (1983), *Pruey v. Department of Alcoholic Beverage Control of N.M.*, 104 N.M. 10, 715 P.2d 458 (1986), *Smith v. Community Bd. No.14*, 128 Misc.2d 944, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *Kay by Disselbrett v. David Douglas School Dist. No. 40*, 79 Or. App. 384, 719 P.2d 875 (1986), *Covenant Community Church v. Lowe*, 698 S.W.2d 339 (Tenn. 1985), *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692 (Tex. 1984), *Bullock v. Texas Monthly, Inc.*, 731 S.W.2d 160 (Tex. Ct. App. 1987).

90. 127 Ill. App. 3d 451, 468 N.E. 2d 1354 (1984).

91. ILL. REV. STAT. ch. 21 para. 101 (1983).

by examining the act's effect: The Act in question has a valid secular purpose. The record indicates that certain religious groups were required to conduct burials on Sundays or holidays because of their religious beliefs and could not always act in accordance with their beliefs because under certain labor agreements, cemetery workers did not have to perform interments on those days. The act eliminated the discriminatory effect of the agreements.⁹² The act clearly had the secular effect of remedying discriminatory work schedules, but it does not follow that this evidences a properly secular purpose behind the act.

In *Bullock v. Texas Monthly*⁹³ a magazine publisher sought to invalidate a provision of the Texas Tax Code⁹⁴ which exempted religious publications from payment of sales tax. The Court of Appeals found the act's secular purpose to be evidenced because it "restricts the fiscal relationship between church and state, and tends to complement and reinforce *the desired separation insulating each from the other.*" (emphasis in original).⁹⁵ The inquiry here is on the effect of the Tax Code section, not on its purpose. It is not clear that a piece of fiscal legislation such as this would be enacted in order to maintain church-state separation.

Essentially, these cases reason that an act which has permissible effects must have been conceived for a permissible purpose. This overlooks the second prong of *Lemon* which expressly examines effect.

Another problem courts have with *Lemon's* purpose analysis stems from the lack of a clearly defined, judicially manageable test for secular or religious purpose. This led one court to speculate as to governmental motives. In *Pre-School Owners Ass'n v. Department of Children and Family Services*,⁹⁶ the Illinois Supreme Court examined a statutory provision⁹⁷ which exempted religiously affiliated day-care centers from its licensing requirements. Applying *Lemon's* purpose prong the Court found that

92. 468 N.E. 2d at 1358.

93. 731 S.W. 2d 160 (Tex. Ct. App. 1987), *rev'd.* 109 S.Ct. 890.

94. TEX. TAX CODE § 151.312 (Supp. 1987).

95. 731 S.W. 2d at 163 (citing *Walz*, 397 U.S. at 676).

96. 119 Ill. 2d 268, 518 N.E. 2d 1018 (1988).

97. ILL. REV. STAT. ch. 23 par 2212.09(i)(1985).

“[T]he legislature *could have* properly found that the need for regulation by the department was more urgent in some areas than in others and therefore *could have* determined to concentrate the Departments’s resources on those programs where the perceived need was greater.⁹⁸ Had the actual purpose behind the act been impermissible under *Lemon*, this fact would nonetheless have been obscured by the court’s willingness to supply a permissible one. Such speculation obviates any attempt at meaningful purpose prong inquiry.

Other courts have been equally creative in analyzing an act’s purpose. *Smith v. Community Bd. No. 14*⁹⁹ involved a challenge to a community board’s approval of the construction of an eruv¹⁰⁰ around a portion of New York City. The Court, looking for a secular purpose, went beyond the eruv’s function as an aid to observing the Jewish Sabbath. “The requirement of a secular purpose has been satisfied inasmuch as the eruv committee raised sea fences which had fallen into disrepair over the years. These sea fences had originally been built to prevent flooding, erosion and windblown sand from going onto the streets and neighboring property.”¹⁰¹ Although a portion of the eruv in question was the sea fence, it is unlikely that the eruv committee’s reason for repairing it was for any purpose other than the maintenance of a religious structure.

Perhaps the simplest way for courts to dispose of purpose prong inquiry is to merely acknowledge a legislative statement of properly secular purpose: “The secular purpose requirement has become a largely perfunctory inquiry easily satisfied by any legislative recitation of purpose. . . . We need only look to the quoted statement of purpose found in RCW 74.16.181 to hold that this statute has a valid secular legislative purpose.”¹⁰²

98. 119 Ill. 2d at 275, 518 N.E. 2d at 1024 (emphasis added).

99. 491 N.Y.S. 2d 584, 128 Misc.2d 944 (N.Y. App. Div. 1985).

100. An eruv, under Jewish law, is an unbroken physical boundary of an area of land owned by the public and open to the public 24 hours a day. It allows a Jewish person observing the Sabbath to move objects from his private residence onto public property and back. Such activities would ordinarily be prohibited during the Sabbath. *Id.* at 585.

101. *Id.* at 587.

102. *Witters v. State Comm’n For the Blind*, 102 Wash. 2d 624, 689 P.2d 53,56 (1984) *rev’d* 474 U.S. 481.

VI. CONCLUSION

The line drawn between church and state will remain perennially flexible, given the inherent tension between the two religion clauses of the First Amendment. Because this line must be continually redrawn, a workable judicial standard is essential to developing a coherent Constitutional framework in this area. The purpose prong of the *Lemon* test undermines this framework by importing an element of subjectivity into an especially vulnerable area of the law. The result is a line of decisions which offer little lasting guidance and are difficult to reconcile. Eliminating the purpose prong will allow the debate to focus on the principle concerns of the Establishment Clause: Has government excessively advanced, repelled or involved itself in religion?

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