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SCYLLA, CHARYBDIS & ADAM SMITH: AN ECONOMIC ANALYSIS OF THE RELIGION CLAUSES

INTRODUCTION

[T]here is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Although the relationship of the two Clauses has been the subject of much commentary, the "tension" is of fairly recent vintage . . . The causes of the tension, it seems to me, are threefold. First, the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses, since such legislation touches the individual at so many points in his life. Second, the decision by [the Supreme] Court that the First Amendment was "incorporated" into the Fourteenth Amendment and thereby made applicable against the States . . . similarly multiplied the number of instances in which the "tension" might arise. The third, and perhaps most important, cause of the tension is [the Court's] overly expansive interpretation of both Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.1

One of the few things on which those analyzing the religion clauses of the first amendment2 seem to agree is that the Supreme Court's pronouncements in this area leave much to be desired.3 In recent years, both commentators and justices have called into question not only certain elements of the Court's current modes of analysis, but also the very premises on which current religion clause jurisprudence rests. The perceived tension between the clauses and the causes of that tension outlined in then-Justice Rehnquist's dissent in Thomas v. Review Board have sparked a number of alternate theories for resolving conflicts between government and religion.

This Comment proposes that the "invisible hand" of Adam Smith's economic theory might aid the weary traveler between the Scylla and Charybdis of religion clause jurisprudence. An economic analysis of the religion clauses would not only offer some explanation and justification for much of what the Court has done in this area of the law, but would also identify a class of cases that perhaps deserve reconsideration.4 Toward these ends,

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.
3. See, e.g., Tushnet, Reflections of the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. & MARY L. REV. 997, 1008 (1986) (no one single concept of purpose can be employed to analyze all problems under the religion clauses).
this Comment will examine the role of history in interpreting the religion clauses, the current state of religion clause doctrine, and various alternative doctrines. The Comment will then examine the economic analysis of law, propose an economic model of the religion clauses and apply the model to reoccurring problems in religion clause jurisprudence.

I. THE RELIGION CLAUSES

A. The Role of History in Interpreting the Religion Clauses

Justices of the Supreme Court have remarked on at least one occasion that history is more important in understanding the relationship between the religion clauses than in understanding any other portion of the Constitution. While the debate over the relationship between government and religion, which motivated the drafting of the religion clauses, predates the clauses, this portion of the Comment is primarily concerned with the history contemporaneous to the drafting of the religion clauses, an era which still influences debate over the clauses.

The religion clauses of the first amendment are the product of a coalition that was generally comprised of two factions. One faction of the coalition, typified by Thomas Jefferson and James Madison, could be called rationalists. The rationalists viewed the separation of government and religion from a more political perspective, tending to emphasize establishment concerns and the protection of government from interference by religion. The other faction, holding the views of Roger Williams, could be called the pietists. The pietists viewed separation from a more ecclesiastical perspective and desired to protect religion from governmental interference.

5. Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."). Justice Rutledge’s dissent received four votes. Indeed, the Everson majority’s treatment of history suggests agreement with the dissent’s premise. See id. at 8-17. See also Marsh v. Chambers, 463 U.S. 783, 790 (1983) (practices of first Congress respecting legislative chaplaincy reveal framers’ intent); Walz v. Tax Comm’n, 397 U.S. 664, 678 (1970) ("[A]n unbroken practice . . . [concerning tax exemptions for religious organizations] is not something to be lightly cast aside.").


8. Roger Williams was "a founder of the Baptist church in North America." L. Pfeffer, Religion, State and the Burger Court 202 (1984). Pietism, as manifested in dissenting churches, such as the Baptists, was a reaction against what was perceived as stagnant state religion. See A. Stokes & L. Pfeffer, Church and State in the United States 26 (1964). Arguably, however, Williams was not a pure pietist. See Little, Roger Williams and the Separation of Church and State, in Religion and the State: Essays in Honor of Leo Pfeffer
The differing interests represented by the rationalists and pietists within the coalition for what many of the framers termed "religious liberty" still underlie much of the current debate about the role of history in interpreting the religion clauses. The renewed interest in history as a guide to interpreting the religion clauses was accompanied, if not prompted, by the expansions of governmental power noted by then-Justice Rehnquist in his Thomas dissent. Interestingly, all three expansions involved the Supreme Court in one way or another. The first expansion concerns the Court's use of the incorporation doctrine. The second expansion was the transformation of the federal government from a laissez-faire government of limited power to a more activist insurer of public entitlements. This second expansion, typified by but not limited to President Roosevelt's New Deal, was initially resisted but ultimately accepted by the Court. A more powerful government increased the chances that some exercise of the police power would conflict with religious liberty. Third, the Court's tendency to broadly construe the religion clauses helped ensure that the differing interests underlying them would edge closer to conflict.

7 (J. Wood ed. 1985). John Locke's views and arguments concerning religious tolerance are similar, if not an outright derivation, of Williams'. See Little, supra, at 7-11.

9. M. Howe, THE GARDEN AND THE WILDERNESS 6 (1965). For example, Roger Williams believed that "worldly corruptions" might consume religion if it were unprotected from government. Id. Nevertheless, some have argued that Williams was also concerned about the involvement of religion in governmental affairs. Little, supra note 8, at 15.

10. The term was often used by the framers to describe both establishment and free exercise concerns. See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 904 (1986).


12. The incorporation doctrine, under which certain portions of the Bill of Rights are held binding on the actions of state governments by the operation of the due process clause of the fourteenth amendment, dates back to the nineteenth century. See Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 234-41 (1897) (fifth amendment just compensation clause made applicable to the states by the fourteenth amendment).

13. In the early 20th century, the Court invalidated a number of economic regulations under the doctrine of substantive due process. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); L. Tribe, supra note 7, § 8-2, at 435. The so-called Lochner era was characterized by a narrow interpretation of valid legislative ends that could be sought under the police power. Id. § 8-4, at 438. However, a number of factors caused the Court to abandon heightened scrutiny of economic regulations and to accord judicial deference toward legislative determinations of the scope of the police power. Id. § 8-7, at 450. See also Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) (upholding economic regulation on any set of possible facts).


A brief examination of the first of these expansions—the Court's use of the incorporation doctrine—is illustrative of the way in which expanded governmental power may have triggered a reexamination of the history of the religion clauses. Initially, the religion clauses, like the rest of the Bill of Rights, were binding on the federal government alone. Because the religion clauses were not binding on state governments, the Court in *Permoli v. First Municipality of New Orleans* upheld the conviction of a priest for violation of a state statute requiring licensure of churches.

Once the Supreme Court held that the religion clauses were binding on state governments under the incorporation doctrine, however, the potential for conflict between the competing interests multiplied. Moreover, this potential was exacerbated by the Court's interpretation of history. For example, in early cases that incorporated the establishment clause, the Supreme Court articulated a strongly rationalist position that would facially appear to forbid any connection between religion and government. For example, in *Everson v. Board of Education*, the Court stated that the establishment clause "was intended to erect 'a wall of separation between church and State.'"

The degree to which the Court actually adhered to a purely rationalist position, however, is arguable. One need look no further than *Everson* to illustrate this point. After invoking the "wall of separation" metaphor, the Court held that a school board may constitutionally reimburse parents for the transportation of children to both public and Catholic schools. The ironic result prompted Justice Jackson to write that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."

Regardless of whether the Court's separationist position was in fact consistent with the Court's actual decision, it is significant to note the Court's reliance on historical material to justify its position.

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17. 44 U.S. (3 How.) 589 (1845).
18. Id. at 608-11.
19. Everson v. Board of Educ., 330 U.S. 1, 14-16 (1947) (incorporation of establishment clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporation of free exercise clause). This Comment will now dispense with the formality of noting the incorporation of the various rights involved in discussing cases later in the Comment.
20. See supra text accompanying note 1.
22. Id. at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
23. Id. at 18.
24. Id. at 19 (Jackson, J., dissenting).
25. Id. at 8 ("Whether this New Jersey law is one respecting an 'establishment of religion' requires an understanding of the meaning of that language. . . . Once again, therefore it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted."") (footnote omitted). See also id. at 33 (Rutledge, J., dissenting) ("'No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.'").
In the years that followed, some took the Court to task for emphasizing the rationalist aspects of the religion clauses while ignoring the historical influence of the pietists.\textsuperscript{26} This criticism may be partially attributable to the expansions of governmental power discussed above. The new pietists argued that the history of the passage of the religion clauses led to the conclusion that government was merely prevented from establishing a church or preferring one sect over another.\textsuperscript{27} Although the pietist version of history pointed up some of the flaws in the purely rationalist position,\textsuperscript{28} this interpretation of the religion clauses was criticized by many\textsuperscript{29} and has not been accepted by the Court.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{26}E.g., M. Howe, \textit{supra} note 9, at 5-15 (role of separation of church and state was developed and supported as much by theologians as by skeptics).
\item \textsuperscript{27}See, e.g., Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("As its history abundantly shows ... nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."); R. Cord, \textit{supra} note 11, at xiv ("[D]ocumented public actions of the Framers ... indicate that the constitutional doctrine of separation of Church and State ... meant that no national religion was to be instituted by the Federal Government; nor was any religion, religious sect, or religious tradition to be placed in a legally preferred position."); M. Malbin, \textit{supra} note 11, at preface (history suggests that "Congress did not mean the establishment clause to require strict neutrality. ... Instead, aid to religion was to be permitted as long as it furthered a purpose the federal government legitimately could pursue and as long as it did not discriminate in favor of some sects or against others.").
\item \textsuperscript{28}For example, as Justice Rehnquist noted in \textit{Jaffree}, the "wall of separation" metaphor originated in a letter from Thomas Jefferson to the Danbury Baptist Association. "Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter ... was a short note of courtesy, written 14 years after the Amendments were passed. ..." \textit{Jaffree}, 472 U.S. at 92 (Rehnquist, J., dissenting).
\item \textsuperscript{29}T. Curry, \textit{The First Freedoms: Church and State in America to the Passage of the First Amendment} (1986); L. Levy, \textit{The Establishment Clause} 93 (1986) ("The fundamental defect of the non-preferential [or new pietest] interpretation is that it results in the unhistorical contention that the First Amendment augmented a nonexistent congressional power to legislate in the field of religion."); Kurland, \textit{The Origins of the Religion Clauses of the Constitution}, 27 \textit{Wm. & Mary L. Rev.} 839, 859 (1986) (new pietest interpretation is defective in that it necessarily assumes that the mere use of a taxpayer's money to provide aid to religious activity does not interfere with that taxpayer's liberty).
\item \textsuperscript{30}Jaffree, 472 U.S. at 52-53 (1985) ("At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but ... the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.") (citing Everson v. Board of Educ., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."); Abington School Dist. v. Schempp, 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally ... impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.")." (footnote omitted).
\end{itemize}
The true role of history in discerning the purpose(s) of the religion clauses, if it can be discerned at all, may lie somewhere between, or outside the purely rationalist or pietist arguments. If the debate over history proves anything, it proves that most assertions made about the history of the religion clauses are open to debate. Moreover, there is the continuing debate about the role of history in constitutional interpretation generally, a debate which is sadly beyond the scope of this Comment.

In sum, while the relevance of history in interpreting the religion clauses is hotly debated in some quarters, history is less than clear in offering any definitive answers to specific problems in religion clause jurisprudence. This point is underscored by the fact that the government of the United States is in some ways fundamentally different from what many of the framers envisioned. Nevertheless, it might be possible to form a general consensus about the purpose of the religion clauses. For example, some have stated that the clauses may be designed to protect individual freedom or religious liberty as understood by many of the framers. Neither of these proposed formulations, however, seems to offer much guidance toward advancing either purpose.

B. Religion Clause Jurisprudence and the Supreme Court

While some have struggled to find a unitary standard by which claims under either religion clause could be adjudicated, the Supreme Court has
been content to set different standards for each clause. The use of different standards may add to the potential for conflict between the clauses. Yet the academic urge to abandon the Court's standards may stem as much from the Court's inconsistent application of those standards as from the potential for doctrinal conflict.

1. The Establishment Clause

The Court typically addresses establishment clause issues by applying a three-prong test articulated in Lemon v. Kurtzman. Under the Lemon test, a court may invalidate a governmental act that: (1) has the purpose of advancing religion; (2) has the primary effect of advancing religion; or (3) excessively entangles government with religion. Violation of any of these prongs will render the governmental act unconstitutional.

a. Purpose

The first prong of the Lemon test asks whether the government action in question has a secular purpose. For example, programs involving aid to nonpublic, or religious schools are usually held to have a secular purpose. For example, in Grand Rapids School District v. Ball, in which non-public classrooms were leased by a school district in order to conduct remedial and optional classes taught by public school teachers, the Court agreed that the

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38. McConnell, supra note 36, at 6. Cf. Adams & Gordon, supra note 7, at 329 (criticizing Tribe's two-standard theory on grounds that the key term "religion" appears only once in the clauses, thus suggesting unitary treatment). For an explanation of Tribe's theory, see L. Tribe, supra note 7, § 14-6, at 826-33.


40. Id. at 612-13.


42. Lemon, 403 U.S. at 612 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)). Sometimes the focus is whether the purpose is to place a stamp of approval or disapproval on religion. Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring); id. at 697 n.3 (Brennan, J., dissenting). The opinions of Justices O'Connor and Brennan represent a five vote majority for this proposition. See also Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (majority opinion cites Justice O'Connor's formulation of the purpose prong from her concurrence in Lynch). This formulation of the purpose prong more closely parallels the Court's formulation of the effect prong of the Lemon test. See infra notes 57-63 and accompanying text.

43. Indeed, the Court rarely strikes down legislation under the purpose prong. See Edwards, 482 U.S. at 613 (Scalia, J., dissenting) (cases cited therein). Nevertheless, aid to religious schools is usually held unconstitutional on other grounds. See infra notes 56-63 and accompanying text.

44. 473 U.S. 373 (1985).
purpose of the program was not only secular, but also praiseworthy.45
Likewise, legislation that exempts religious institutions from general gov-
ernment programs typically is held to have a secular purpose. For example,
in *Walz v. Tax Commission*,46 a statute granting property tax exemptions
specifically to religious properties, in addition to exemptions for property
used for educational and charitable purposes, was held to have a secular
purpose.47 The *Walz* Court characterized the purpose of the statute as merely
lifting a property tax burden from private profit institutions.48
In *Texas Monthly, Inc. v. Bullock*,49 however, the Court struck down an
exemption from state sales and use taxes provided to religious publications
dedicated to proselytizing religious belief.50 The *Texas Monthly* plurality held
that such a limited exemption lacked a secular purpose.51 The plurality
distinguished *Walz*52 by pointing out that the tax exemptions in those cases
flowed to a wide variety of organizations, including non-religious groups,
whereas the *Texas Monthly* exemption was granted exclusively to religious
organizations, thus sending a "'message of endorsement' to slighted members
of the community."53
Further, other statutes that do not exempt religious organizations from
governmental programs are still found to violate the purpose prong. For
example, in *Stone v. Graham*,54 the Court held that a law requiring the
posting of the Ten Commandments on the walls of public classrooms was
unconstitutional under the establishment clause.55 Although the state courts
below held that the "avowed" purpose of the statute was secular, the Court
held that the mere assertion of a secular purpose is insufficient to save a
statute with a "pre-eminent" religious purpose.56

45. Id. at 383 ("As has often been true in school aid cases, there is no dispute as to the
[purpose] test."). See also id. at 382 ("Providing for the education of schoolchildren is surely
a praiseworthy purpose.").
47. Id. at 672.
48. Id. at 673.
50. Id. at 894 (plurality opinion of Justice Brennan joined by Justice Marshall and Justice
Stevens); id. at 907 (Blackmun, J., concurring in the judgment, joined by Justice O'Connor);
id. at 905 (White, J., concurring in the judgment).
51. Id. at 901. Justice Blackmun's concurrence in the judgment may also imply that the
tax lacked a secular purpose, based upon his interpretation of the tax as being limited to
religious publications, excluding atheistic literature. Id. at 907. Interestingly, Justice Blackmun
neither cites nor refers explicitly to the *Lemon* analysis in the opinion.
52. Id. at 898-900; see id. at 907 (Blackmun, J., concurring in the judgment) (citing Wallace
53. Id. at 900 (citing Corporation of the Presiding Bishop of the Church of Jesus Christ
of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the
judgment)).
55. Id. at 41.
must be a secular legislative purpose.") and with Bowen v. Kendrick, 108 S. Ct. 2562, 2570
(1988) (inquiry is whether the action "is motivated wholly by an impermissible purpose")
(citations omitted).
b. Primary Effect

The second prong of the Lemon test asks whether the governmental action has the primary effect of advancing religion. In *Grand Rapids School District v. Ball*, the Court struck down two programs in which non-public classrooms were leased by the school district for the purpose of holding remedial and optional classes taught by public school teachers. Noting that 40 of the 41 schools involved in the programs were "pervasively sectarian," the Court held that the programs at issue may have had the effect of impermissibly advancing religion.

In the context of permissible exemptions from government programs, a Court plurality distinguished *Walz* in *Texas Monthly*. In *Walz*, the Court upheld a property tax exemption for religious organizations because the exemption had the effect of promoting both intellectual pluralism and private initiatives within a community. In contrast, the Court plurality invalidated the sales tax exemption in *Texas Monthly*, in part, because the narrow exemption went to publications which proselytize, which had the primary effect of advancing religion.

c. Excessive entanglement

The final prong of the Lemon test asks whether the action may cause an excessive entanglement of government and religion. In assessing the entan-
legation, the Court may consider: the character and purpose of the recipient, the type of aid being given, and the nature of the relationship between the government and the religious group. For example, in *Aguilar v. Felton*, the Court was faced with a New York City program similar to the programs struck down in *Ball*. Both cases involved the use of publicly funded and controlled instructors, as well as publicly funded materials and supplies for classes of private school students. Also, the vast majority of participating schools were religiously affiliated in both cases. In contrast to *Ball*, however, the New York plan required field personnel to oversee classes conducted under the program. Such supervision was intended to ensure that the classes did not have religious content. Yet the Court struck down the program on the ground of excessive entanglement because it required government agents to work with sectarian school officials in determining schedules and student needs.

Entanglement was another ground on which the Court distinguished *Walz* in *Texas Monthly*. The *Walz* Court had found that a property tax exemption served further to separate rather than entangle religion. In contrast, the *Texas Monthly* Court held that the sales tax exemption for magazines which proselytize might embroil state officials in evaluating the religious content of the publications.

As the foregoing discussion might indicate, the development of this three-prong test has not provided easily understood rules to guide the behavior of either governmental or religious institutions. For example, within the parochial school aid context, it may be difficult for those not versed in the arcana of religion clause jurisprudence to discern the difference between busing a parochial school student on a field trip, which is unconstitutional, and busing a parochial school student to a parochial school, which is constitutional.

Likewise, the

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66. Id. at 615.
68. Id. at 409.
69. Id.
70. Id.
71. Id. at 406-07.
72. Id. at 424 (O'Connor, J., dissenting) ("Indeed, in 19 years there has never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense.'") (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 397 (1985)).
73. Id. at 413. This is perhaps one of the sharpest examples of what is referred to by then-Justice Rehnquist as the "Catch-22" argument. Id. at 420-21 (citing Wallace v. Jaffree, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting)). *Aguilar* and *Ball* were decided on the same day. The programs in *Ball* were struck down for their possible effects, but the attempt to disprove those same possible effects doomed the programs in *Aguilar*.
75. *Walz* v. Tax Comm'n, 397 U.S. 664, 676 (1970) ("It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.").
78. *Wolman* v. *Walter*, 433 U.S. 229, 252-55 (1977). Moreover, the government may lend...
decision in *Texas Monthly* produced four separate opinions,\(^7^9\) including a sharp dissent from Justice Scalia, who maintained that Justice Brennan's plurality opinion misreads *Walz*.\(^8^0\)

The level of frustration with the *Lemon* test on the Court has been evident. The Court has been willing to modify the purpose prong, looking at whether there has been a purpose to endorse religion, primarily as a response to concerns raised by Justice O'Connor.\(^8^1\) Nevertheless, Justice Scalia has on at least one occasion questioned the utility of the purpose prong of the *Lemon* test.\(^8^2\) Further, Chief Justice Rehnquist recently has not only criticized the entanglement prong of the test,\(^8^3\) but has also argued for abandoning the test in its entirety.\(^8^4\)

Moreover, the pronouncements of the Court in some of its majority opinions tend to cast doubt on the continuing vitality of the *Lemon* test.\(^8^5\) There are cases where the Court has implied that the test is not necessarily...
dispositive or where the Court has "watered-down" the test in application. For example, the case of *Lynch v. Donnelly*, in which the Court held that a city may sponsor a creche without violating the establishment clause, was criticized for applying a weakened version of the *Lemon* test. There is at least one recent case where the Court did not even purport to use the test and instead looked to history for guidance.

2. The Free Exercise Clause

The Court's current mode of free exercise analysis employs a form of strict scrutiny that requires government to show a compelling state interest to outweigh burdens placed on a person's individual beliefs. Moreover, the

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86. Hunt v. McNair, 413 U.S. 734, 741 (1973) (*Lemon* test provides "no more than [a] helpful signpost.").
88. Id.
89. E.g., id. at 696 (Brennan, J., dissenting) ("[T]he Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial."); id. at 726 (Blackmun, J., dissenting) (*Lemon* "compels an affirmance here") (emphasis in original); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 784 (*Lynch* fits within *Lemon* "[i]n an artless sense—but in no sense that will withstand even the mildest scrutiny").
90. The Court recently revisited the creche issue in *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989), but the Court's five-opinion, "can't tell where the Justices are without a scorecard" product does not clear up this issue any further. See Grady, *Yuletide: A Season for Lights and Lawsuits*, Chicago Trib., Nov. 24, 1989, at 1, col. 2. (quoting Professor McConnell as stating that it is "extremely probable that there will be more litigation than ever before").

While this Comment was in the editing pipeline, the Supreme Court, by a 5-4 vote, held that the *Sherbert* balancing test would not be applied in cases involving facially neutral statutes which have an impact on religious conduct. Employment Div., Dept. of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433, 4437 (1990).

In *Smith*, the Court held that a state can outlaw use of hallucinogenic peyote, even sacramental use by members of the Native American Church. The Court noted that the *Sherbert* test had
government may be required to show that there is no less restrictive alter-
native to its course of action. The result has been a rather robust protection
of religious belief and activity.

In *Sherbert v. Verner*, Mrs. Sherbert, a Seventh Day Adventist, was fired
from her job at a textile mill because she refused to work on Saturday, her
Sabbath. She was unable to accept other jobs for the same reason and
applied for unemployment benefits, which were denied. The Court held
that a religious believer should not be forced to choose between observing
the Sabbath and having a job, and therefore Mrs. Sherbert was entitled to
an exemption from the unemployment benefits statute which denied payment
to those who refused "suitable work." 

Likewise, in *Wisconsin v. Yoder*, Old Order Amish parents challenged
fines levied against them after they removed their children from school after
the eighth grade, in violation of Wisconsin's compulsory education law. The
parents argued that mandatory secondary public schooling was contrary
to the Amish belief that separation from the secular world is necessary for
salvation. Although the state argued that children who later leave the Amish
community would be unprepared for life in the secular world, the Court
rejected this argument, stating that there was no evidence of former Amish
burdening society because of their educational shortcomings. Consequently,
the Old Order Amish were entitled to an exemption from the statute.

Nevertheless, like the establishment clause cases, some of the Court's more
recent decisions tend to cast doubt on the level of scrutiny afforded free

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93. *Id.* at 399.
94. *Id.* at 399-401.
95. *Id.* at 410. The Court noted that a similar exemption already existed in the statutory
scheme for Sunday worshipers in times of "national emergency." *Id.* at 406.
97. *Id.* at 207-08.
98. *Id.* at 209.
99. *Id.* at 224.
100. *Id.* at 234-36. The Court found that "the Wisconsin law affirmatively compels [the
Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental
tenets of their religious beliefs." *Id.* at 218 (citing *Braunfeld v. Brown*, 366 U.S. 599, 605
(1961)). The "fundamental tenet" that guaranteed the Amish the right to withdraw their
children from compulsory education was their "literal interpretation of the Biblical injunction
from the Epistle of Paul to the Romans, 'be not conformed to this world.'" *Id.* at 216.
exercise claims. The Court has not only found more governmental interests compelling, but has also been more willing to accept indirect governmental burdens placed on individual free exercise rights.

In at least two cases involving the federal tax system, the Court has found governmental interests sufficiently compelling to override an individual's free exercise interest. In *United States v. Lee*, an Old Order Amish employer and his Amish employees argued that they were entitled to an exemption from social security taxes because their religion required them to support the needy and aged members of their community. The Court held that maintenance of the federal tax base was a compelling interest that justified taxation of the Amish. Consequently, the Old Order Amish employees were not entitled to an exemption from social security taxes.

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101. Choper, supra note 36, at 951 ("[T]he Burger Court has interpreted the free exercise clause generously. This largess always has had limits, however, and recent evidence suggests that the Burger Court's benevolence may be substantially spent.").
103. Id. at 255.
104. Id. at 258. Facially, *Lee* would appear to be in tension with *Yoder* because "precisely the same religious interest is implicated in both cases, and Wisconsin's interest in requiring its children to attend school until the age of 16 is surely not inferior to the federal interest in collecting these social security taxes." Id. at 263 n.3 (Stevens, J., concurring in the judgment).

Nevertheless, the *Lee* majority attempted to justify its decision by invoking a "slippery slope" argument premised on the idea that social security taxes are analogous to general income taxes. The Court argued that if "a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." Id. at 260.

However, as Justice Stevens points out, "[t]he Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own." Id. at 262 (Stevens, J., concurring in the judgment). Moreover, the claim in *Lee* is distinguishable from the hypothetical case involving national defense because the insurance provided by social security could be obtained privately by the Amish, whereas intercontinental ballistic missiles and the like are public goods. See Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 88-89 (1988). Nonetheless, Justice Stevens concurred with the other eight justices because of "the difficulties associated with processing other claims to tax exemption on religious grounds." *Lee*, 455 U.S. at 263 (footnote omitted) (Stevens, J., concurring in the judgment). Justice Stevens' objection does not rest upon the difficulty of exempting religious believers from a general program; rather, "[i]t is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims." *Lee*, 455 U.S. at 263 n.2. (Stevens, J., concurring in the judgment). The risk is that disparate treatment of religious claims may raise the perception that the establishment clause is being violated. *Id.* (Stevens, J., concurring in the judgment). However, the adoption of a general rule that religious exemptions to general programs will not be granted by the Court would not necessarily eliminate that perceptual problem, because such a rule avoids passing judgment on the relative merits of religious claims by suggesting that religious claims have little or no merit.

105. *Lee*, 455 U.S. at 261. "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* (footnote omitted). Congress had already granted an exemption to self-employed Amish. *Id.* at 260.
The following term, in *Bob Jones University v. United States*, the Court unanimously held that the elimination of racial discrimination was a compelling governmental interest. In *Bob Jones*, several private, religiously-inspired schools with racially discriminatory policies challenged the Internal Revenue Service's decision to deny the schools their tax-exempt status. The schools defended their policies as being based upon certain religious beliefs. The Court not only agreed that ending racial discrimination was a compelling interest, but also agreed that there were no less restrictive means of achieving that goal than denying tax exempt status to the schools; thus, the Court upheld the Service's decision.

Other cases indicate that the Court is likely to find military interests sufficiently compelling to justify governmental impingement on an individual's free exercise interests. The Court first suggested this possibility in an establishment clause case. Subsequently, in *Goldman v. Weinberger*, an Air Force officer challenged a regulation which prohibited the wearing of headgear indoors. The Court carved out an exception to the strict scrutiny standard for military affairs, deferring instead to the judgment of military professionals. Consequently, the Court upheld the regulation.

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107. *Id.* at 604. ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.") (footnote omitted).
108. *Id.* at 581. The change in the Service's policy followed litigation that enjoined it from approving tax-exempt status to any school in Mississippi that maintained a policy of discrimination. *Id.* at 578-79.
109. *Id.* at 604-05.
111. *Gillette*, 401 U.S. at 461 n.23 (1971) (dictum) (citing *Hamilton v. Regents*, 293 U.S. 245, 264 (1934)). See also *Welsh*, 398 U.S. at 370 (White, J., dissenting) ("[T]his Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers."). In *Gillette*, petitioners sought to be exempted from the Selective Service Draft due to their opposition to the Vietnam War. The legislation contained a statutory exemption from conscription for those opposed to all war for religious reasons. *Gillette*, 401 U.S. at 439-40.
112. 475 U.S. 503 (1986).
113. *Id.* at 505-06. Petitioner, an ordained rabbi in addition to a commissioned officer in the United States Air Force, argued that the military regulation which barred him from wearing a yarmulke violated his first amendment free exercise rights. *Id.*
114. "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507. See also *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (enlisted personnel may not sue superior officers for damages arising from alleged violations of constitutional rights because "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (Air Force regulations
Recent cases also suggest that the Court has been more willing to accept indirect governmental burdens placed on individual free exercise rights. In a case predating the Sherbert Court's announcement of a strict scrutiny standard, Braunfeld v. Brown, the Court held that a law requiring that certain types of stores be closed on Sundays did not violate an Orthodox Jewish merchant's free exercise rights. Braunfeld argued that to follow both the law and his religious beliefs required him to close his store on both Sunday and Saturday, which not only imposed an economic burden on him, but also deterred people from becoming Orthodox Jews. The Braunfeld Court reasoned that the merchant's economic burden was outweighed by the state's interest in a uniform day of rest and in avoiding potential administrative burdens and the potential windfall to the merchant that might result from an exemption.

In the post-Sherbert era, Braunfeld may have been of dubious precedential value. However, two more recent cases suggest that indirect burdens on free exercise, such as the economic burden in Braunfeld, may still be accepted by the Court. For example, in Bowen v. Roy, the Supreme Court held requiring approval prior to on-base circulation of petitions to Congress are valid); Greer v. Spock, 424 U.S. 828, 838-40 (1976) (upholding Army regulations banning partisan political speech on base and requiring prior approval of literature to be distributed on base). For examples of deference to the military in other contexts, see Schlesinger v. Councilman, 420 U.S. 738, 757-58 (1975) (court-martial charges for selling drugs while off-duty were not within equitable jurisdiction of civilian court); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (physician who refused to admit or deny membership in Communist Party and thus assigned as Army laboratory technician not entitled to commissioned rank or discharge).

Two seminal cases which demonstrate the lengths to which the Court has gone in deferring to military interests are Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew on all persons of Japanese ancestry as a valid exercise of the war power of Congress and President), and Korematsu v. United States, 323 U.S. 214 (1944) (upholding exclusion of all persons of Japanese ancestry from the West Coast war area). Korematsu is important as one of the first cases to announce that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." Id. at 216. Compare with Hirabayashi, 320 U.S. at 101 ("Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.") (emphasis added). Korematsu thus establishes not only that racial classifications will be subject to strict scrutiny, but also that military interests may override strict scrutiny.

119. Id. at 608-09. The Court suggested, however, that the state legislature might well provide an exemption for religious believers. Id. at 608.
121. 476 U.S. 693 (1986).
that a Native American dependent may be assigned and forced to provide a social security number for the purpose of receiving Aid to Families with Dependent Children benefits. Roy had refused to allow his child to be assigned a social security number because he believed that the use of a such a number might impair his child's soul. Analogous to Braunfeld, the Roy Court reasoned that the potential administrative costs to the government of granting religious exemptions outweighed the infringement of the individual's free exercise rights.

The same doctrine was applied in Lyng v. Northwest Indian Cemetery Protective Association, in which the Court held that government could build a logging road through sacred burial sites on government-owned land without showing a compelling interest. Although the Court noted the potential destruction of Indian religious exercise that might result from construction of the road, the Court followed Roy, holding that the government action was valid because it neither coerced the Indians into violating their beliefs nor penalized the Indians' religious practice through the denial of privileges accorded other citizens.

The weakening of free exercise doctrine may have prompted litigants to seek other vehicles for the advancement of religious interests. For example, in Widmar v. Vincent, the Court held that a public university's policy

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122. Id. at 712.
123. Id. at 697. At trial, Roy had initially focused on the evil caused simply by obtaining a social security number. The government then argued that the case was moot, because the number had already been issued. Roy later testified that it was the use of the number, which had not yet occurred, that would cause his daughter's spirit to be robbed. Id. See also Roy v. Cohen, 590 F. Supp. 600, 605 (M.D. Penn. 1984) (finding of fact 33).
124. Roy, 476 U.S. at 709-12. See also id. at 730 (O'Connor, J., concurring in part and dissenting in part) ("[A]lthough prevention of welfare fraud is concededly a compelling interest, the Government asserts only administrative efficiency as its reason for refusing to exempt appellees from furnishing the Social Security number."). Justice O'Connor, joined by Justices Brennan and Marshall, distinguished the facts of Roy. In Roy, the government already had the necessary information to issue a social security number and merely used the number for internal government processing. Id. at 726-27 (O'Connor, J., concurring in part and dissenting in part). Thus, these three justices dissented from the case insofar as plaintiff would be required to provide a social security number to obtain benefits.
126. Id. at 1333 (Brennan, J., dissenting) ("The Court does not for a moment suggest that the interests served by the G-O road are in any way compelling.").
127. Id. at 1326. "The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." Id.
128. Id. at 1325. In support of this rationale, the Court seemingly moves toward a far more literal interpretation of the free exercise clause. Id. at 1326 ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. . . . [But] the crucial word in the constitutional text is 'prohibit.'").
excluding religious groups from using university facilities for meetings was unconstitutional under the free speech clause. The Court rejected the university's argument that allowing access to religious groups would violate the establishment clause. Instead, the Court viewed the university facilities as a "public forum" and the policy as an unconstitutional content-based restriction on speech.

Thus, like the trend in recent establishment clause cases, there seems to be a gap between the Court's free exercise doctrine and its actual decisions. That the Court appears more willing to accept the assertion that a governmental interest is compelling or that a burden on free exercise is merely indirect demonstrates the point. That parties may turn to other provisions of the Constitution to protect religious interests underscores the point. Therefore, it is not surprising that some have looked for other principles to explain the Court's results.

C. Alternate Theories

This section will discuss three of the most prominent theories advanced by scholars in the attempt to provide a coherent method of addressing the religion clauses. It is interesting to note the way in which these theories parallel the different approaches employed by the Court in the postwar era, as well as the different views of the various framers.

1. Strict Separation

The strict separation theory reflects the view taken early in the postwar era in cases such as Everson v. Board of Education. Strict separation of


130. Widmar, 454 U.S. at 277. In Widmar, student members of a religious group argued that a university regulation that prohibited the use of university facilities for religious purposes violated, in part, their freedom of speech. Id. at 265-66.

131. Id. at 270-75.

132. Id. at 274-77. The Court had previously recognized state universities, or at least portions thereof, to be public forums for university students. E.g., Healy v. James, 408 U.S. 169 (1972). Cf. Police Dep't of Chicago v. Mosely, 408 U.S. 92, 96 (1972) (sidewalk adjacent to high school recognized as public forum).

133. See Widmar, 454 U.S. at 277. The university failed to show a compelling state interest met by a narrowly drawn regulation. See id. at 270 (citing Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980)).

134. See supra notes 85-90 and accompanying text.


government and religion would forbid both direct and indirect aid to religion. Although invocation of the "wall of separation" between government and religion may have a certain symbolic value to the ordinary observer, this theory is subject to several lines of criticism.

First, strict separation is vulnerable to the extent that it relies on the purely rationalist version of history advanced by the Everson Court. Second, application of strict separation produces results that would often appear to be hostile to religion and religious liberty. For example, if strict separation were adopted by the Court, it is possible that religious institutions could be denied access to water and sewer services, as well as fire and police protection. Moreover, even if religion and government were amenable to this degree of separation, there might be those who would be suspicious of a sectarian police force outside government control. Taking the argument to its logical extreme reveals the impracticability of the doctrine; under the strict separation theory, the armed forces of the United States would be forced to segregate their protection of religious and secular institutions within the nation's borders from attack, nuclear and otherwise.

2. Strict Neutrality

A second approach to the religion clauses revolves around the concept of neutrality. Strict neutrality theory, commonly associated with Professor Kurland, would read the religion clauses as forbidding the government's use of religious classifications in the imposition of societal benefits and burdens. Although the Court has periodically embraced the general concept of neutrality, even Professor Kurland has acknowledged that the Court has not embraced strict neutrality.

Like strict separation, strict neutrality has been subject to various lines of criticism. First, the prohibition of religious classifications may be contrary
to the clauses themselves, which refer to religion. Second, strict neutrality does not address problems involving facially neutral laws that have a disparate impact on religion. The gradual transformation of the federal government from an insurer of negative rights against government to an insurer of positive rights in the form of entitlements and benefits makes strict neutrality less attractive to those who wish to protect both establishment and free exercise values.

3. Accommodation

A third theory, reflecting a Madisonian concern with religious pluralism, has been advanced to protect religious liberty, primarily free exercise values. Accommodation theory, which would permit government to single out religion for relief from burdens on free exercise, traces its roots to Zorach v. Clauson. In Zorach, the Court upheld a program which released public school children from class for off-premises religious instruction. Accommodation may also underlie a series of more recent cases upholding various statutory exemptions for religious institutions.

There are several versions of accommodation theory, one of which permits the removal of only governmentally imposed burdens on free exercise rights. Another prevalent version of accommodation theory, advanced by Professor McConnell, would extend to both publicly and privately imposed burdens

144. For example, the statutes at issue in Yoder and Braunfeld were both facially neutral. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (Wisconsin's compulsory school attendance law required all children to attend public or private school until reaching age 16); Braunfeld v. Brown, 366 U.S. 599, 600 (1961) (Pennsylvania criminal statute required all merchants to close certain retail stores on Sunday). Another way of stating the same argument is to ask whether government inaction, for example, the failure to exempt religion in a statute, should be considered either neutral or hostile to religion. For stark examples of the logical consequences of strict neutrality, see Laycock, supra note 139, at 1000 nn.24-28 and accompanying text.
145. See Giannella, supra note 14, at 1388-90.
146. 343 U.S. 306 (1952).
on free exercise. Professor McConnell proposes a three-prong test to determine when government should accommodate religion. The first prong asks whether the proposed accommodation of religion acts as an inducement or coercion of belief. The second prong asks whether the proposed accommodation interferes with the religious rights of others. The third prong asks whether the accommodation would prefer one sect over another.

As with the previous two theories, accommodation is open to criticism. One line of criticism is that Professor McConnell’s approach is too broad, addressing societal burdens on free exercise in addition to governmental burdens. Essentially, the argument is that Professor McConnell’s theory is based on a false analogy. The “free exercise values” which he seeks to protect are not analogous to “equal protection values” that justify legal prohibitions on private discrimination. While the free exercise clause is limited by the establishment clause, the equal protection clause has no such limitation.

Second, either form of accommodation theory may weaken the free exercise clause as well as the establishment clause. Accommodation theory is based on the premise that as government has expanded, it has placed burdens on government unforeseen at the time of the framing of the Constitution; thus, government should be able to balance these burdens through statutory exemptions. The inference may be that two wrongs make a right—placing burdens on everyone, including religious believers, is permissible, so singling out religion for relief from burdens shared by all is also permissible.

II. Economic Analysis Of Law

This Comment proposes that a theory of the religion clauses based on economic analysis would not only provide a coherent basis for decision, but

150. McConnell, supra note 36, at 30-34.
151. Id. at 35-41.
152. Id. at 35-37.
153. Id. at 37-39.
154. Id. at 39-41.
155. Adams & Gordon, supra note 7, at 336 n.98.
156. Id. The difficulties inherent in extending Professor McConnell’s theory into the private sector can be shown with an example. The case of Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985), in which the Court struck down a statute that would have compelled private employers to give Sabbatarians their Sabbath off, would have been constitutional under Professor McConnell’s approach. McConnell, supra note 36, at 51. Professor McConnell concludes that the statute did not discriminate among sects because “[a] Sabbath is common to all the major religions of the country—Christianity, Judaism, Islam.” Id. at 55. Ironically, Professor McConnell himself states that “most accommodations are of value only to members of minority religions.” Id. However, Professor McConnell appears to be referring to the devout minority of majority religious sects. Id. However, it seems odd to argue that a statute does not discriminate among sects by reference to majority religions, while ignoring minority religions which do not share a Sabbatarian belief. The statute may be designed to promote equality or neutral treatment of different religions, but the statutory means in Caldor are not neutral.
would also avoid many of the problems raised about the competing theories discussed previously. This portion of the Comment will first discuss the economic analysis of law in general, defining the terms to be used throughout the remainder of the discussion. Second, this portion will examine the possible moral and ethical bases for a jurisprudence grounded in economic analysis.

A. General Concepts of Economic Analysis

"Economics" must be defined before the concept of economic analysis can be examined. Economics is typically defined as the science which studies the way humans allocate scarce resources.158 Economics is more than the mere study of money.159 Rather, economics is generally employed in the attempt to maximize value, which may be defined as the aggregate consumer willingness to give up other valued goods or services.160 Economists call outcomes that maximize value "efficient."161 Economists look at different types of efficiency. For example, an outcome that leaves some parties better off and no parties worse off than they were previously would be "Pareto-superior" efficiency.162 Pareto-superior efficiency is tied to the "willingness to pay" component of value; it is concerned with voluntary transactions.163

The legal system, however, may be unable to provide Pareto-superior outcomes for two reasons. First, litigation often results in involuntary transfers of wealth and/or value.164 Second, a judicial remedy may not leave the parties in a position where all parties may gain from the decision.165

For example, if a landowner would pay $100,000 to be free of a height restriction on building construction, and the landowner’s neighbors would insist on only $20,000 in compensation, one would expect the parties to negotiate for a price between those two figures. This would be the Pareto-superior result. However, if the dispute were litigated and a court invalidated the height restriction, the landowner may not be forced to compensate the

159. Id. § 1.1, at 6.
160. Johnsen, Wealth Is Value, 15 J. LEGAL STUD. 263, 268 (1986). Posner defines value as "how much someone is willing to pay for [something] or, if he has it already, how much money he demands to part with it." R. Posner, supra note 158, § 1.2, at 11. Johnsen's formulation is theoretically more accurate because it takes into account lost opportunity costs. For example, both money and time spent in obtaining an item are components of value. Johnsen, supra, at 268. However, Posner's definition is more easily measured. R. Posner, supra note 158, § 1.2, at 15 (wealth is measured by what people would pay for things instead of by what they do pay).
164. Id. This is often the very essence of the judicial function; if a party can get compensation for another's wrongdoing, there would be no need for the first party to sue.
165. Id. at 64.
neighbors. Under this second scenario, the landowner gains $100,000 and the neighbors lose $20,000. This would be a "Kaldor-Hicks" efficient outcome, which is defined as a result in which the "winning" parties gain more than "losing" parties stand to lose. 166 Consequently, economic analysis of law typically examines the Kaldor-Hicks efficiency of a decision. 167

Efficiency can also be viewed in terms of distribution and productivity. 168 Distributional efficiency describes a world where goods and services are distributed to those who value them most. 169 Distributional efficiency is important because those who value something the most are in the best position to compensate the producers of that commodity. 170 Productive efficiency describes a world where the stock of goods and services increases. 171 Productive efficiency is important because it is productivity that raises the overall standard of living in the long run.

A classic case used to illustrate economic concepts is based on the facts of Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc., 172 which involved two competing hotels along the Florida coastline. The owners of the Fontainebleau wanted to build a 14 story addition to their hotel. 173 The owners of the Eden Roc Hotel sought to enjoin construction, claiming that the shadow cast by the addition during the winter would shade the Eden Roc's cabana, swimming pool and sunbathing area. 174 Traditional intuitive legal analysis suggests that Fontainebleau's construction of its addition would cause harm to the Eden Roc; thus, the issue focuses on whether there is a remedy for this harm.

Economic analysis, however, introduces the concept of joint causality. 175 For example, instead of concluding that the Fontainebleau would harm the Eden Roc, one could argue that enjoining construction allows the owners of the Eden Roc to cause harm to the owners of the Fontainebleau, simply because they built their swimming pool first. 176 Thus, the real issue is to decide which party shall be harmed. 177 Economic analysis is directed toward maximizing value by avoiding the more serious of the two harms. 178

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166. Id. The term comes from the names of the first two economists to popularize the concept.
167. Unless otherwise noted, efficiency will be measured by the Kaldor-Hicks standard in this Comment.
169. Id.
170. Id. at 273.
171. Id. at 270-71.
172. 114 So. 2d 357 (Fla. 1959), cited in Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 8 n.6 (1960).
173. Fontainebleau, 114 So. 2d at 358.
174. Id.
175. Coase, supra note 172, at 2-6.
176. See id. at 2.
177. See id.
178. See id.
In the Fontainebleau example, the more serious harm is avoided by allocating the entitlements of the parties and determining the appropriate remedy. In this particular case, construction of the addition has not yet begun. Thus, Fontainebleau is in the best position to determine what price it would be willing to pay for its proposed addition, as opposed to some other investment, or placing the addition elsewhere. Therefore, issuing an injunction, which places the Fontainebleau in the position of negotiating with the Eden Roc, should produce the more efficient outcome. Alternatively, had the Fontainebleau been at a stage of construction at which it would be cheaper for the Eden Roc to move its cabana and swimming area, enjoining the Fontainebleau would be inefficient because the Eden Roc would be the cheapest cost-avoider.

179. The Coase theorem postulates that, assuming transaction costs are near zero, the actual result will be the same, regardless of the remedy. Id. at 8.

For example, suppose that the Fountainbleau values its addition at $1 million, and the Eden Roc values its swimming pool at $500,000. If the injunction is denied, the addition will be constructed. If a court issues an injunction in favor of the Eden Roc, the parties will negotiate for the injunction to be dissolved at a price between $500,000 and $1 million, and the addition will probably still be constructed.

Conversely, if the Fountainbleau only valued its addition at $500,000 and the Eden Roc valued its pool at $1 million, the opposite result would obtain in either situation. If the injunction is denied, the Eden Roc will negotiate with the Fountainbleau to prevent the addition; if the injunction is granted, the addition will not be built. In short, the rule of law and the remedy merely create an environment for negotiation.

The assumption that transaction costs are zero, however, is often unrealistic. Coase, supra note 172, at 15. Transaction costs can be large and need to be considered. See id.; Coase, The Coase Theorem and the Empty Core: A Comment, 24 J.L. & Econ. 183, 187 (1981). See also supra note 160 (contrasting definitions of value).

180. Of course, there are other possible combinations of entitlements and remedies, including damages. However, damages are not considered in detail here because they are not typically sought in cases arising under the religion clauses. For a full discussion of the allocation of entitlements and remedies, see, e.g., Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

181. This is in fact the actual result in the case, although the economic rationale is implicit, at best. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc., 114 So. 2d 357, 361 ( Fla. 1959).

Another example of the cheapest cost-avoider concept involves theories of tort liability familiar to most first-year law students. Many torts, such as medical malpractice, are litigated on a theory of negligence. Showing negligence requires proof of a duty from one party to another, a breach of that duty by some act or omission, and the proximate and legal causation of an injury to the other party. W. Prosser, Handbook on the Law of Torts § 30, at 143 (4th ed. 1971). Some torts, however, such as those involving defective products, proceed on a theory of strict liability, which does not require a showing of fault akin to the breach of duty in negligence. Id. § 75, at 494. Generally, either tort theory may be efficient. R. Posner, supra note 158, § 6.5, at 160-61. However, when a soda bottle explodes in the hand or face of a consumer, strict liability may be more efficient for two reasons. First fault is not easily assigned, because one is unsure if the explosion were due to a manufacturing defect or mishandling by the shipper, the retailer or the consumer. Second, the manufacturer is the cheapest cost-avoider, because it is in the best position to evaluate the cost of producing soda in bottles as opposed to other, perhaps safer, containers. Johnsen, supra note 160, at 281.
If judges explicitly decided cases on the above types of criteria, economics would become prescription, rather than a mere description of an efficient result. In the past, economic analysis of law was largely confined to the areas of antitrust and taxation. In the early 1960's, however, some proposed that economic concepts may be applicable in many other fields of law. However, the idea that economic analysis may form a positive as well as normative theory of law has not been without its critics. Many of the objections to the economic approach are easily answered. The bedrock criticism of the theory, that value maximization is not an ethical or moral theory upon which the law may be based, however, is not so easily dismissed.

B. Value Maximization as an Ethical Theory

Value maximization may be understood as an attempt to harmonize teleological theories, such as utilitarianism, and deontological theories, such as those growing out of the work of Immanuel Kant. Utilitarianism is sometimes criticized as often allowing the collective to trample individual rights, whereas Kantian theories are occasionally disparaged as championing civil liberties regardless of the consequences to the collective. Consequently, some have searched for theories that strike a balance between individual and collective interests. Value maximization is one of the results of that search.

The science of economics and utilitarianism share many of the same roots. Thus, some critics make the mistake of equating value maximization with utilitarianism and then proceed to attack utilitarianism. These critics miss some important distinctions between the two theories.

For example, the objection that utilitarianism would allow the collective to unduly intrude on individual liberty has no counterpart in value maximization theory. Under a system of value maximization, the collective would

183. Id. § 2.1, at 19.
186. Moreover, the author does not expect that the following textual discussion will in any way impede the already voluminous body of writing on this subject.
188. Id.
189. Id.
intrude on the individual only in cases where two elements are present. First, there must be market failure, which is defined as a transaction by which harmful effects are imposed on third parties. Market failure, however, is the exception rather than the rule.93 Second, the harm caused by the market failure must be greater than the harm that would be suffered by the prevention of the transaction.94

In addition, utilitarianism faces the problem of interpersonal comparison of utility—that it is difficult, if not impossible, to compare the happiness of two persons. Economic analysis eliminates this problem by focusing on the concept of value, rather than happiness.95 The fallacy of equating value maximization, which relies on the aggregate willingness to pay for goods and services, with utilitarianism, which relies on the happiness principle, is analogous to equating money with happiness, which would lead to the conclusion that money can buy happiness.96

Value maximization has been likened not only to utilitarianism, but also to deontological principles akin to the Golden Rule.97 First, economic analysis is primarily concerned with ex ante increases in societal value. Consequently, a court employing economic analysis must treat the parties equally, without reference to personal traits extrinsic to the dispute.98 Second, economic analysis asks judges to assume the role of a universal person, an analysis at the root of ideas like the Golden Rule.99 Third, the concept of consent, which complements the Kantian emphasis on personal autonomy, represents the "willingness" concept underlying Pareto superiority.200

The first criticism of the deontological arguments for value maximization is that equal treatment of persons is a mere procedural right.201 Consequently, one could conceive of a Hobbesian state of nature in which many substantive rights are violated.202 In short, because value maximization theory only ensures equal treatment of persons, the argument is that value maximization is an empty theory devoid of substantive rights and may allow equal treatment of persons who are unequally situated.

194. In short, where either decision in a particular case will impose a cost on one of the parties, the economically efficient decision cannot be reached unless one knows both the value of what is gained and the value of what is lost. See Coase, supra note 172, at 2.
196. Id. at 63-64. Although value and happiness are both subjective, value is far more easily measured. See supra note 160 (distinguishing definitions of value).
198. Id. at 420-21. However, personal characteristics may influence calculation of damages. See, e.g., Calabresi, The Cost of Accidents 205-24 (1970).
199. Id.
202. Id.
There are several responses to the criticisms above. The first is that procedure is important, if not often crucial to the resolution of a dispute.\textsuperscript{203} The second response is that equal treatment is only one of many rights that may be derived from the concept of value maximization. Judge Posner goes to great length in his treatise to demonstrate how entire systems of property,\textsuperscript{204} contract,\textsuperscript{205} and tort rights,\textsuperscript{206} to name but a few, may be derived from the value maximization principle.\textsuperscript{207} The fact that these rights may not be absolute merely eliminates the problems that would be engendered by a system based solely on personal autonomy.\textsuperscript{208} A third response is that even if one wants a legal system that is not based entirely upon value maximization, economic analysis can still be an important tool for decisionmaking.\textsuperscript{209}

The other strand of the first line of criticism, that value maximization would allow for arbitrary treatment by treating unequal parties equally is similarly unpersuasive. In essence, the criticism suggests that economic analysis has nothing to say about distributive justice, which focuses on the relative equality or inequality of persons in a society. In reality, economic analysis has much to say about distributive justice.\textsuperscript{210} Some equalization of incomes arguably increases societal value.\textsuperscript{211}

The second line of criticism is directed against the concept of the economic person as a rational maximizer of self-interest. One strand of the argument is that economic analysis falsely assumes that people care solely about the size of their own wallets. However, economic analysis makes no such assumption. To the contrary, economic analysis often takes altruism and caring for others into account.\textsuperscript{212} The other strand of the argument challenges the
assumption of rationality. But attacking this assumption serves no point for two reasons. First, the criticism demonstrates a lack of comprehension of the very nature of science, because theories depend upon a certain level of abstraction that is not reflected in reality. Second, pointing out a theory's shortcomings does not discredit the theory unless there are more powerful theories available.

The third line of argument challenges value maximization's connection with consent. The focus of this argument is that consent is the basis of Pareto-superiority, yet the economic analysis of law typically deals with Kaldor-Hicks efficiency because courts may be unable to ensure Pareto-superior results. The conclusion is that the economic analysis of law cannot be supported by consent arguments because of the difference between Pareto-superiority and Kaldor-Hicks efficiency. However, this argument rests on an assumed definition of consent. This assumed definition would mandate that not only the litigants, but also all relevant third parties, give their consent to a given transaction.

Yet this is not the only definition of consent. Consent can just as easily be defined in terms of consenting to a system. For example, this definition of consent underlies the notion of the social contract. For example, the

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principles into account, the economic approach may at some point become consistent with the public choice theory advocated by John Rawls in A Theory of Justice (1971).

Rawls bases his theory on several "principles of justice." First, the theory should provide the maximum amount of liberty consistent with equal rights for all members of society. Second, any inequalities engendered by the theory should ultimately work to the advantage of all members of society. Third, the theory must allow opportunities for all members of society to gain a favored position in the society. See R. Wolff, Understanding Rawls 37-38 (1977).

213. For example, Newtonian physics, in positing that objects will accelerate at the same speed through space, assumes a vacuum rarely present on earth. Further, the "Big Bang" theory assumes that at some point in time, all matter in the universe was once compressed to the size of a pinhead.


215. Judge Posner admits that if all transactions must be strictly voluntary, the power of the argument is diminished because so few transactions have the consent of every affected party. Judge Posner's solution under a Kaldor-Hicks analysis is to decide whether a voluntary transaction could or would have occurred in a given situation. Id. § 1.2, at 14. For a further discussion of the economics of multi-party transactions, compare Aivazian & Callen, The Coase Theorem and the Empty Core, 24 J.L. & Econ. 175 (1981), with Coase, supra note 179.


In this respect, a comparison between Posner and Rawls is illuminating. Both Rawls and Posner are contractarians. Both theories require universal persons to make a choice about the society in which they want to live. R. Posner, supra note 187, at 99. Thus, both theories must rest on arguments from inferred consent instead of autonomy, because the choice made by the universal persons are then imposed as reality. See Dworkin, Why Efficiency?, 8 Hofstra L. Rev. 563, 573-79 (1980); Cohen, supra note 197, at 417. Dworkin, however, is hostile to value maximization theory. Nevertheless, he does concede that value maximization might be considered a valid ethical theory if interpreted as a theory of natural responsibility: a theory which dictates
United States and state constitutions can be seen as social contracts. These social contracts, to which the citizenry has consented, establish the protection of certain rights, as well as legislative, executive and judicial bodies that govern the behavior of the populace. Those bound to the social contract need not unanimously approve every governmental act to satisfy the requirement of consent; if such a requirement were necessary, few governmental actions would be valid.

This second definition of consent is compatible with value maximization. It is possible to consent to a system that employs Kaldor-Hicks efficiency, perhaps even desirable to do so if one expects everyone to benefit from such a system in the long run. The fact that a party may not consent to every decision made under that system is then not crucial to the validity of the system as a whole.

In sum, it is safe to say that value maximization is not a perfect ethical or moral theory. But value maximization is an ethical theory, one that can insure both procedural and substantive rights, that attempts to strike an uneasy balance between the demands of the individual and the collective. Value maximization achieves this balance by blending elements of utilitarianism and deontological theories while eliminating the more problematic aspects of each. Professor Morawetz has argued that this argument is akin to "saying that if a snow plow and a tractor are both defective tools for

that people take responsibility for those costs which would have been assigned to a person by law in a community in which public and private action were consistent with a sense of justice and equal concern for all. See Dworkin, supra, at 586-90.

Moreover, both Posner and Rawls have analogous concepts of law. Rawls identifies four elements of law. First, law must be capable of being complied with by the persons to which the law is directed. Second, the law must treat equally persons who are similarly situated. Third, the law must be public, rather than secret. Fourth, the law must provide procedures for finding the truth of those facts necessary to decide a case. J. Rawls, supra note 212, at 237-39 (1971). All four of these elements are a part of the economic analysis of law. R. Posner, supra note 158, § 8.4, at 242-43.

One of the chief differences between the theories of Rawls and Posner is their respective assumptions about human nature. Rawls assumes that people, in what he calls "the original position" behind a "veil of ignorance," would choose to live in a society which maximizes the utility of the worst-off segment of the society. In short, Rawls assumes persons are generally risk averse. By contrast, Posner assumes that persons are more individualistic, entrepreneurial, and congenial to risk-taking. For a more detailed comparison, see R. Posner, supra note 158, § 16.3, at 437-38, R. Posner, supra note 187, at 100-01.


218. "A characteristic product of a democratic—perhaps of any—legislative process is the unprincipled redistribution of wealth in favor of politically effective interest groups." R. Posner, supra note 158, § 24.4, at 586. See also Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 269 (1982) (it is possible "to classify statutes between those that advance the public interest and those that advance instead the interest of some (narrow) interest group.")
brain surgery, and if a meat cleaver is different from both a snow plow and a tractor, then a meat cleaver is a fit tool for brain surgery."\textsuperscript{219} But this statement misrepresents the argument. The argument is that at the very least, a meat cleaver is as fit a tool for brain surgery as those tools employed by others. Moreover, it is possible that the meat cleaver, by eliminating the obvious defects of the snow plow and the tractor, may in fact be a more fitting tool for brain surgery, perhaps the best tool, assuming there are no scalpels.

\section*{III. Economic Analysis And The Religion Clauses}

\subsection*{A. Economic Analysis and the Constitution\textsuperscript{220}}

An economic analysis of the United States Constitution suggests that it "differs from an ordinary statute in (1) its costs of enactment (including amendment) and, less distinctly, (2) its subject matter."\textsuperscript{221} The first difference suggests that the durability of the Constitution is enhanced by the general rule that courts will give a more flexible interpretation to the Constitution than to an ordinary statute.\textsuperscript{222} The implications of the second difference, the Constitution's subject matter, depend in large measure upon which portion of the document is examined.

From an economic perspective, those provisions of the Constitution respecting federalism and the separation of powers serve the purpose of preventing the concentration of coercive power by government, a monopoly which potentially would be extremely costly.\textsuperscript{223} Consequently, erecting cost barriers to governmental collusion would be justified.

However, Judge Posner claims that the analysis changes for those portions of the Constitution, including the religion clauses, that guarantee personal rights. Judge Posner asserts that while some of the personal rights ensured by the first amendment, such as the protection of political speech, are necessary to maintain decentralized government, freedom of religion may be solely personal.\textsuperscript{224} In sum, the protection of personal, nonpolitical rights may be seen as entrenched interest-group protection.\textsuperscript{225}

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\begin{itemize}
  \item \textsuperscript{219} Morawetz, \textit{supra} note 201, at 436.
  \item \textsuperscript{220} Economic analysis of the Constitution conceptually predates the "new law and economics" school commonly associated with Judge Posner. See C. Beard, \textit{An Economic Interpretation of the Constitution of the United States} (1972) (1st printing 1913).
  \item Beard argued that commonly accepted analyses of the Constitution underestimate the economic interests that motivated many of the framers. According to Beard, by the end of the 19th century, the "realistic view of the Constitution"—one arising from "an alignment of economic interests"—was "submerged in abstract discussions of states' rights and national sovereignty and in formal, logical, and discriminative analyses of judicial opinions." \textit{Id.} at vi. However, Beard did not perform an economic analysis of rights guaranteed by the Constitution.
  \item \textsuperscript{221} R. Posner, \textit{supra} note 158, § 24.1, at 581.
  \item \textsuperscript{222} \textit{Id.}
  \item \textsuperscript{223} \textit{Id.} § 24.2, at 583.
  \item \textsuperscript{224} \textit{Id.} § 24.3, at 585.
  \item \textsuperscript{225} See \textit{id.}
\end{itemize}
Arguably, the religion clauses do fall into the category of political rights that help ensure the decentralization of the coercive power of the state. Without the establishment clause, one could at least imagine the possibility of a nation controlled by a theocracy outside the cost barriers erected by the Constitution. And while the free exercise clause can be seen as interest-group protection, such protection may be justified by the influence which religion and religious belief has on the moral, ethical, and ultimately political life of the nation.226

Regardless of whether the protection given to religion is justified by its (historical) relationship to politics and government, the fact remains that the religion clauses are indeed a part of the Constitution. Identification of the clauses as interest-group protection is not inconsistent with the underlying history of their passage.227 In fact, the economic interpretation of the clauses suggests at least one reason why the clauses are perceived to be in tension with each other. That is, if the clauses were drafted to insulate the private sphere of religion from the public sector, and vice versa, then the expansion of the public sector would seem to be at least partially responsible for the tension between the clauses.228 Thus, it would be desirable to articulate a theory of the religion clauses that functions smoothly in a society where the line between public and private, between government action and inaction, has become less distinct.

B. Developing An Economic Model of the Religion Clauses

A theory of the religion clauses based on economic analysis is well-suited to solving the problems of religion clause jurisprudence in the modern era for several reasons. First, value maximization is equipped to tackle the relationship of the individual to the state.229 Second, insofar as the religion clauses deal with “aid” to religion, and competing theories wrestle with the definition of “aid,” economic concepts may offer a fresh perspective. Third, the concept of joint causality eliminates the harm/benefit dichotomy for which competing theories are criticized, focusing instead on the issues of social cost and finding the cheapest cost-avoider.230

Interestingly, Judge Posner has not had much to say about applying economic analysis to the religion clauses.231 This is particularly unusual because Judge Posner has written opinions in cases dealing with each of the

226. "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." Walz v. Tax Comm'n, 397 U.S. 664, 693 (1970) (Harlan, J., concurring). See also Giannella, supra note 14, at 1404 (regulation of citizens and states represents basic values largely influenced by Judeo-Christian tradition of religion and the conception of man in Bill of Rights).

227. See supra note 7 and accompanying text.

228. See supra notes 13-14 and accompanying text.

229. See supra notes 187-219 and accompanying text.

230. See, e.g., supra note 181 and accompanying text.

231. But see McConnell & Posner, An Economic Approach to Issues of Religious Freedom,
ciples. However, in his treatise, he briefly suggests two possible ways of viewing the religion clauses. First, the clauses may be viewed as anti-discrimination measures. Second, a violation of the religion clauses may be viewed as an unduly harsh redistribution of value, analogous to a taking of property without just compensation. The Comment will discuss each possibility and develop an economic model of the religion clauses that incorporates both rationales.

The first possible purpose of the religion clauses is that of preventing discrimination on religious grounds. To the economist, discrimination is consistent with concepts of efficiency. For example, a consumer making a choice among several different brands of the same product could be said to be discriminating. However, it does not necessarily follow that discrimination against persons on the basis of race or religion is efficient. When one group discriminates against another, neither group profits. Those who discriminate may refuse to enter into transactions with members of the disfavored group that would increase their wealth comparative to the same transaction with a member of the favored group. Members of the disfavored group will suffer reductions in income from discrimination. If the disfavored group is a minority, those losses in income will be proportionately greater than those suffered by the discriminating person.

The losses suffered by both groups are economic disincentives to discrimination, so long as the market is not allowed to become a monopoly through government action. If there is free competition, unbiased traders will become the market leaders. Thus, it should not be surprising that the constitutional justification for anti-discrimination statutes lies in the promotion of interstate commerce; such laws promote efficiency.

56 U. Chi. L. Rev. 1 (1989) (published during the editing of this Comment), noted in Epstein, supra note 104, at 83 n.235.

232. See ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) (Posner, J.) (establishment clause claim protesting display of latin cross during Christmas season); Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982) (Posner, J.) (free exercise claim of orthodox Jewish high school students against rule prohibiting student basketball players from wearing headgear). See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986) (Posner, J.) (teacher group seeking to hold religious meetings at school before the school opens under free speech clause).

233. R. Posner, supra note 158.

234. Cf. id. § 27 (analogy to racial discrimination).

235. Id. § 24.3, at 586.

236. R. Posner, supra note 158, § 27.1, at 526.


238. R. Posner, supra note 158, § 27.1, at 615.

239. Id.

240. Id. Moreover, any retaliatory discrimination by the minority against the majority will only serve to further injure the minority. G. Becker, supra note 237, at 24.


242. Id. § 27.1, at 616.

243. Id. § 27.4, at 621.
The implications of the above argument as applied to the religion clauses are fairly simple to discern. The establishment clause, by preventing government from preferring or disfavoring any group of religious interests, keeps sects active, competitive,244 and perhaps less prone to discriminate. The free exercise clause, by protecting the individual’s religious beliefs, provides yet another barrier to discrimination by government.

However, an economic model of the religion clauses based on an analogy to a taking of property without just compensation takes not only the anti-discriminatory aspect of the clauses into account, but also touches on many other concerns in religion clause jurisprudence. An economic model of the religion clauses might then resemble the efficiency-based test for just compensation associated with Professor Michelman.245

Professor Michelman identifies three quantities that would be weighed to determine whether government should compensate for a taking of property. First, there are demoralization costs, which are defined as the sum of the loss of value accruing to the losing parties and their sympathizers, and the value of lost future production caused by the demoralization of all parties disturbed by the possibility of like treatment in the future.246 Second, there are the settlement costs necessary to avoid demoralization costs, including: the cost of settling claims similar to the case at issue; the costs of adjudicating the claims which are not settled; and the cost of settling or adjudicating all claims which would not have been brought if the initial claim had not gone forward, minus any savings in demoralization costs for claims which are not judicially recognized.247 Third, there are the efficiency gains that would accrue as a result of the government action.248

In a system based on value maximization, efficient measures would be presumptively valid. But Professor Michelman notes that the general definition of efficiency “takes no account of demoralization costs caused by a

244. See generally Zorach v. Clauson, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects.’’).
246. Michelman, supra note 4, at 1214.
247. Id. at 1214 & n.99.
248. Id. at 1214. Note, these must be exclusive of the above-mentioned costs.
capricious redistribution, or alternatively, of the settlement costs necessary to avoid such demoralization costs."\textsuperscript{249}

Of course, the definition of demoralization costs is crucial to Michelman’s formulation of the problem.\textsuperscript{250} Professor Michelman posits that people demand compensation caused by purposeful social action. Michelman then defends this assumption by imputing purposiveness to the actions of a collective, as opposed to more random forces such as earthquakes, tornadoes, and the like. The argument asserts that the individual can obtain insurance in the latter case, but not in the former case. The conclusion of the argument is that the risk of being systematically exploited by others is of a far greater magnitude than the risk of an occasional accident.\textsuperscript{251}

Michelman then identifies situations in which there will be a remedy for systematic exploitation. First, there will be a remedy when either of the two costs would exceed efficiency gains. There will be a remedy whenever there is a capricious redistribution which could have easily been avoided.\textsuperscript{252} This ground for relief is clearly tied to the concept of the cheapest cost-avoider. Second, there will be a remedy where the efficiency argument supporting the government action is tenuous.\textsuperscript{253}

The “balancing” model developed by Michelman can then inform an analysis of the religion clauses in several ways. First, by focusing on the risk

\textsuperscript{249.} Id. at 1215.

\textsuperscript{250.} The formulation of demoralization costs has also been one of the more discussed and criticized aspects of the Michelman approach. Fisher, supra note 245, at 1777-81. Generally, the economic criticisms of the demoralization cost concept relate to insurance. For example, some have suggested that it is more efficient for individuals to insure themselves because the assurance of compensation will lead people to overinvest in their property, confident that all investment will be compensated. Kaplow, supra note 245, at 529. Economists call this problem “moral hazard.” Ross-Ackerman, supra note 245, at 1705.

Assuming the argument to be correct, there are several replies. First, to this author’s knowledge, private insurance is currently unavailable for both takings and infringements on religious liberty. Consequently, granting a remedy, such as compensation for a taking, may serve to efficiently distribute the risk of government action throughout society. See id. Second, private insurance is unlikely to be written because insurance companies may have less information about the risk of government action than the owners of property rights or religious rights. See id. (in takings context). Third, important parts of the demoralization cost concept would remain even if moral hazard were factored out of the formula. The individual’s demoralization in a particular case would remain, as would demoralization that accrues to those who lose some measure of faith or consent in the legal system. Fisher, supra note 245, at 1779-80. Fourth, granting a remedy is generally preferred in order to promote productive efficiency. Johnsen, supra note 160, at 273-73.

\textsuperscript{251.} Michelman, supra note 4, at 1217.

\textsuperscript{252.} Id.

\textsuperscript{253.} Id. at 1218. See also Posner, Free Speech in an Economic Perspective, 20 Suffolk U.L. Rev. 1, 18 (1986) (impermissible purpose for legislative action which restricts speech may be inferred from inefficiency). Inferring purpose in the absence of direct evidence is efficient because it may avoid the problem of settlement costs caused by “false signalling,” which may include the adjustment of the legislative process so that otherwise unconstitutional measures appear lawful.
of systematic exploitation, the model is analogous to the anti-discrimination rationale discussed above, but applies to a broader set of concerns. Second, the model removes the problem of discerning intent that plagues the first prong of the Lemon test. Third, economic analysis, by identifying situations in which government is the cheapest cost-avoider or the efficiency argument is tenuous, can help separate justifiable secular ends from the impermissibly sectarian.

C. Applications

Generally, cases arising under the establishment clause require the Court to answer one of two basic questions. The first question is whether some support of religion must be excluded from a more general, neutral government program. The other common question is whether an exemption for religion specified by law is valid. Similarly, cases that arise under the free exercise clause tend to pose one of two basic questions. The first question is whether persons are entitled to an exemption from a general governmental program due to their religious beliefs. The second question is whether a religion-based exclusion from a government program is valid.254

The following portion of this Comment examines how religion clause jurisprudence might look if the Supreme Court applied the economic model discussed above.

1. The Establishment Clause

a. Must religion be excluded from a general program?

Typically, this is the question presented by cases involving governmental attempts to aid nonpublic schools. The first way in which economic analysis may illuminate this problem is by helping define “aid.” Aid is understood by the economist to mean a subsidy.255 An economic analysis of the problem indicates that the distinctions drawn by the Court are often as unconvincing as they would be to the ordinary observer.

Parents generally want their children to be educated for two reasons. First there are the internal benefits of education that accrue to the individual child and to the family.256 Second, there are the external benefits of education,
such as crime reduction and economic growth, which are shared and desired by all members of the society.\textsuperscript{257}

The desire for the public benefits of education explains why the general public taxes itself to provide for education; taxes serve to internalize the external benefits of education.\textsuperscript{258} However, in a society governed in part by the establishment clause, there will be those who seek to prevent tax dollars from flowing to parochial schools. These objections are far more likely to be directed at the internal benefits provided by sectarian schools, which include the inculcation of religious belief, than at the external benefits, which are generally the same, if not greater than those provided by public education.

The separation of religious schools and public schools will have the economic effect of making religious tuition more expensive and public tuition less expensive.\textsuperscript{259} However, there are two important features of this arrangement that should be noted. First, religious families will not be paying twice if they are still required to pay taxes for public education. Instead, religious families are paying for internal benefits of education at the sectarian school while still paying taxes for the external benefits of public schools.\textsuperscript{260} In this sense, religious families are no more burdened than are childless taxpayers.

Second, the public funding of public schools in this situation is not a subsidy to public school users. The public’s demand is for the external benefits of education, which is jointly supplied with internal benefits.\textsuperscript{261} The joint supply of benefits in education is analogous to more common examples, such as the markets for both beef and leather from cattle.\textsuperscript{262} The internal benefits of education could be beef; the external benefits could be hides. The price in each market will depend on the demand in the other market.\textsuperscript{263} A change in the price of a good resulting from a change in the demand for another good is not a subsidy.\textsuperscript{264}

However, this analysis calls into question not only the Court’s application of the \textit{Lemon} test, but also the Court’s attempt to restrict governmental aid of religious schools to secular teaching and materials. While the Court tends to find that there is a secular purpose in school aid cases, many attempts to help sectarian schools fail the effect and/or entanglement prongs of the \textit{Lemon} test.\textsuperscript{265} In applying the effect and entanglement prongs, the Court attempts to demand that products which are jointly supplied be separately supplied.\textsuperscript{266} Where two quantities are jointly supplied, there are no “primary

\begin{itemize}
\item \textsuperscript{257} Id. at 79, 84.
\item \textsuperscript{258} Id. at 84.
\item \textsuperscript{259} Id. at 84-85.
\item \textsuperscript{260} Id. at 84.
\item \textsuperscript{261} Id. at 84-85.
\item \textsuperscript{262} Demsetz, \textit{Joint Supply and Price Discrimination}, 16 J.L. & Econ. 389, 390 (1973).
\item \textsuperscript{263} West, \textit{supra} note 256, at 84-85.
\item \textsuperscript{264} Id. at 86.
\item \textsuperscript{265} “As has often been true in school aid cases, there is no dispute as to the [purpose] test.” Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383 (1985).
\item \textsuperscript{266} West, \textit{supra} note 256, at 86.
\end{itemize}
effects"; the effects are jointly produced. Requiring that the internal and external benefits of religious education be separately produced makes as much sense to the economist as asking a cattle rancher to produce beef without producing hides or vice versa. Likewise, the internal and external benefits of education, whether religious or secular, are as inherently entangled as are the beef and leather of cattle.

The conclusion that government may purchase the external benefits of religious education without subsidizing internal benefits does not necessarily mandate the conclusion that any form of aid to sectarian schools would be constitutional. Some forms of aid might in fact result in a subsidy to religious schools. Other forms of aid might well unconstitutionally discriminate between sects.

Under the Michelman-inspired model proposed by this Comment, aid to nonpublic schools would be presumptively valid if the government makes a nontenuous argument that such aid is efficient. As the discussion above indicates, the purchase of the external benefits of education in order to reduce crime and promote economic growth will probably suffice to establish a presumption of validity. Thus, a court would be forced to determine whether the supposed gain in societal value resulting from various types of aid might be outweighed by either demoralization or settlement costs.

Demoralization costs might be extensive in the school aid context for several reasons. First, there is the perceived symbolic link between government and religion engendered by aid to sectarian institutions. The symbolic link is emphasized because there are situations where government action may coincide with religious belief without raising the perception that government is advancing religion in the mind of the ordinary observer. For example, laws against murder, which mirror prohibitions against killing found in Judaism, Christianity and perhaps other religions, do not raise such a perception. In contrast, the provision of funds by government to an institution engaged in the inculcation of religious belief or the intertwining of secular and religious personnel may raise a perception of establishment. The result may be great discomfort to members of the community on grounds of principle or on the ground that they are receiving treatment different from religious families. This sort of discomfort, if made public, is perhaps

267. Not that an economic analysis focused only on economic subsidies and penalties could not reach this conclusion. See Epstein, supra note 104, at 83 (citing McConnell & Posner, supra note 231).

268. Government action is not unconstitutional simply because it "happens to coincide or harmonize with the tenets of some or all religions." McGowan v. Maryland, 366 U.S. 420, 442 (1961). Otherwise, "the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing." Wallace v. Jaffree, 472 U.S. 38, 70 (O'Connor, J., concurring).

269. This would be a stronger argument at the primary and secondary school level than at the college or university level. See Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle, 81 HARV. L. REV. 513, 516 (1968).
what the Court has referred to as "divisiveness." In short, the demoralization cost analysis looks not to effect or entanglement, because both will usually obtain in the economic sense; rather it looks to the perception of the government action and its ultimate effect on the community.

Settlement costs may also be high. The costs of adjudicating or settling a particular suit and settling or adjudicating similar claims that would not have been brought if the initial claim had not been recognized are high enough. However, in the context of the religion clauses there are further potential costs. The costs attributable to judicial error are potentially high, particularly when attempting to steer a course between two (or three) potentially conflicting clauses of the Constitution. The error costs may even compound themselves because decisions which rest upon fine or fuzzy distinctions may encourage later actions which become the subject of litigation.

By focusing on the symbolic link between religion and government, and the divisiveness engendered by a perceived link, the Court would be able to fashion a more coherent body of law in this category of cases. If the busing of children to parochial schools could be justified by the Court as a constitutional safety measure, then it is possible that busing the same children on field trips may not create a stronger symbolic link or create further divisiveness. Likewise, if the Court can find that the loan of a science book does not create those evils which the religion clauses are designed to prevent, then it is possible that the loan of a science kit may not cross over the constitutional line. And the Court would have to consider whether the

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271. Michelman, supra note 4, at 1214.

272. Cases involving the religion clauses may also raise free speech issues, and vice versa. See supra notes 129-33 and accompanying text.

273. Cf. Posner, supra note 253, at 25. Judge Posner notes that the potential for error is especially high, given that most judges tend to be members of the dominant groups in society, thus perhaps reducing judicial sensitivity to the claims of nondominant views. Although the point is made by Judge Posner in the context of free speech, the analogy to the religion clause context seems simple, given the connection between religion and expression. See also McConnell & Posner, supra note 231, at 11 (laws touching religion held to a stricter efficiency standard than laws touching speech because government may promote speech but not religion).

274. For example, one could look at the number of cases involving aid to nonpublic schools. See, e.g., Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (noting repeated governmental attempts to help nonpublic schools). One could also examine the confusion in the lower courts engendered by the decision of Lynch v. Donnelly, 465 U.S. 668 (1984).

275. See supra notes 77-78 and accompanying text.

276. See id.
symbolic value of forcing low-income students in religious schools to attend remedial programs off-campus is worth the societal cost.\textsuperscript{277}

b. May religion be specifically exempted from a program?

A typical exemption issue involves exempting a religious institution from various forms of taxation by government.\textsuperscript{278} Analogous to the discussion of the school aid cases, it may be helpful to ask whether tax exemptions can be construed as a subsidy to religion.\textsuperscript{279} In the context of exemptions, the answer is much easier to obtain.

In order to conclude that tax exemptions are subsidies, one must start with the premise that government owns the gross national product (GNP), or at least owns some portion of the GNP which can be identified for the purposes of litigation.\textsuperscript{280} To disprove the argument, one need only consider one's own personal income tax return. Assuming that government is not taxing individual income at the rate of 100\% each person or family has some income remaining. This remaining income could be viewed as the accumulation of various tax exemptions. But in a capitalistic society in which many people do not work for the government, it would be odd to call one's after-tax income a governmental subsidy.

Moreover, in a society that identifies religion and religious pluralism as two of its values, government may wish to avoid the appearance of using the power to tax as a power to destroy\textsuperscript{281} either value. Finally, government may find that religious organizations provide certain secular external benefits to the community—"good works." Government may then decide to offset those external benefits by allowing religious institutions to externalize their costs in the form of a tax exemption.\textsuperscript{282}

Taking the factors discussed above into account, this Comment's economic model provides a coherent explanation of the Court's decisions in the context of exemptions. Justice Brennan's interpretation of Walz in Texas Monthly, regardless of its accuracy as a matter of history, provides a guidepost. Promoting intellectual pluralism and private initiative within a community


\textsuperscript{279} The Court has answered this question in the affirmative. Texas Monthly, 109 S. Ct. at 899 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983)).

\textsuperscript{280} West, supra note 256, at 96. See also Bittker, Churches, Taxes and the Constitution, 78 Yale L.J. 1285, 1288 (1969) (tax statutes can always be written in terms of inclusion, rather than exclusion, thus weakening supposition that an "exemption" is clearly defined).

\textsuperscript{281} Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{282} Posner, supra note 253, at 20-21 (good works as basis for common law exemptions from tort liability for religious and charitable institutions).
may well be accepted as an efficient governmental objective. Demoralization
costs resulting from such an exemption, as well as the settlement costs
necessary to avoid demoralization, are far more likely to be low when there
is no appearance of sectarian discrimination. Thus, more inclusive statutes,
such as the exemptions at issue in *Walz* are more likely to withstand scrutiny
than the narrower exemption in *Texas Monthly*, which not only focused
solely on religious organizations, but also seemed to exclude agnostic and
atheistic viewpoints.

c. The display of religious symbols by government

This category is meant to cover the class of recent cases typified by *Lynch
v. Donnelly* and *Marsh v. Chambers*, which seem to resist application
of the *Lemon* test. As in the other types of establishment clause cases
discussed above, the display of religious symbols by government may not
involve a subsidy to religion. Nevertheless, under the economic model of
this Comment, it is likely that this sort of "aid" would be unconstitutional.

While the Court has struggled with its own articulation of establishment
clause doctrine,

there is a simple reason why the governmental display of religious symbols would be invalid under this Comment’s economic test; under an economic analysis, government-sponsored religious displays are
directly analogous to the type of nuisance created by competing hotels on
the Florida coast. Thus, the cheapest cost-avoider should be enjoined.

In cases like *Lynch*, government will probably be the cheapest cost-avoider
for several reasons. First, under the Michelman-inspired model, the govern-
ment’s efficiency arguments are likely to be tenuous. For example, the
arguments typically advanced by government in favor of sponsoring a creche
are that the display promotes both local retail sales
and the celebration of
the Christmas holiday through traditional symbols. Yet government would
be perfectly capable of promoting both goals through the display of traditional symbols other than those depicting the birth of Christ.

283. Cf. Michelman, *supra* note 4, at 1216 (arguing a "special urgency in the demand for publicly financed compensation when a loss has evidently been occasioned by deliberate social action") (footnote omitted).
287. See *supra* notes 85-90 and accompanying text.
288. See *supra* notes 36-90 and accompanying text.
289. See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc., 114 So. 2d 357 (Fla. 1959); *supra* text accompanying notes 172-74.
290. See *supra* note 179-81 and accompanying text.
292. *Id.* at 693 (O’Connor, J., concurring).
Cf. ACLU v. City of St. Charles, 794 F.2d 265, 275 (7th Cir. 1986) (public display of Latin cross).
Furthermore, demoralization costs are likely to be high. The governmental display of a creche, regardless of its status as a traditional holiday symbol, creates a symbolic link between government and Christian sects that may offend the non-Christians in the community and erode confidence in government. The demoralization caused by a government-sponsored creche may also cause "outsiders" to avoid the creche, thus depriving them of the use of publicly-funded streets and sidewalks.²⁹⁶

Alternatively, the settlement costs may be high.²⁹⁵ Governmental sponsorship of a creche is likely to prompt demands for equal treatment of other sects, demands that will be impossible to satisfy in many instances.²⁹⁶ Agnostics and atheists may have no symbols which the government could display, even if it wanted to do so. Even if the claims of atheists and agnostics could be set aside, the vast religious pluralism in the United States,²⁹⁷ pluralism that is seemingly promoted by the religion clauses,²⁹⁸

²⁹⁴. *City of St. Charles*, 794 F.2d at 275. Interestingly, the Court found the avoidance cost to be the basis of plaintiff's standing to invoke the jurisdiction of the court. *Id.*

The standing doctrine focuses on whether the plaintiff is a party entitled to the adjudication of the dispute. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing has both constitutional requirements, *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and prudential requirements. *Warth*, 422 U.S. at 499-502. One of the prudential requirements bars suits by taxpayers to redress "generalized grievance[s]" shared by the public at large. *Id.* at 499; *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The Court, however, has recognized an exception to this rule in the establishment clause context. *Flast v. Cohen*, 392 U.S. 83, 104-06 (1968). The *Flast* Court held that taxpayers could sue where they could establish a "nexus" between a congressional expenditure under the taxing and spending clause of the Constitution and a specific constitutional limit on the taxing and spending clause, such as the establishment clause. *Id.* at 102.

Nevertheless, this exception to the general bar against taxpayers suits is quite narrow. In *Valley Forge*, the Court distinguished *Flast* on the grounds that the former involved a transfer of property by an administrative agency under the control of the executive. *Valley Forge*, 454 U.S. at 479-80. Without passing judgment on the validity of these distinctions, the economic model presented in this Comment would be consistent with stringent standing requirements insofar as such requirements would be necessary to prevent the problem of infinite regress in calculating costs. See Michelman, *supra* note 4, at 1215 n.100.

²⁹⁵. See Grady, *Yuletide: A Season for Lights and Lawsuits*, Chicago Trib., Nov. 24, 1989, at 1, col. 2. ("The threat of lawsuits has been enough to convince officials in some suburbs to abandon their holiday traditions.").


The city fathers of Pawtucket, Rhode Island, ostensibly fearful of the possibility of vandalism, chose to erect this past year's Nativity scene in the monkey house of the municipal park zoo. The stench and screeching of the primates, although not of the ox and lamb variety, did lend a certain authentic, if not quite reverent, flavor.

*Id.*

makes it at least possible that there would not be enough property available to government to equally display symbols of all religions, resulting in sectarian discrimination.

The litigation engendered by the Lynch decision demonstrates the additional settlement costs inflicted on society by the Court’s rationale, which rested in part on the idea that the creche was somehow “neutralized” by the remaining secular portion of the city’s holiday display.\(^{299}\) For example, future litigation may involve distinguishing between a painted creche and an unpainted creche, a large creche and a small creche, and the distance of the creche from the “neutralizing” secular symbols.\(^{300}\)

In sum, the efficiency gains, if any, of governmental-sponsored religious displays are meager. The divisiveness caused by a display that links religion and government and the litigation that ensues inflict large costs on the entire society. Thus, cases like Lynch would be wrongly decided under this Comment’s economic model.

Consequently, the establishment clause would look slightly different under this Comment’s economic approach. Government would be allowed more discretion in aiding nonpublic schools. Inclusive religious exemptions from government programs would probably still survive, although careful drafting would be necessary to avoid the appearance of sectarian discrimination. However, the governmental sponsorship of religious symbols would rarely, if ever, be sustained.

2. The Free Exercise Clause

a. Is a religious exemption from a general program required?

This category of cases represents the bulk of free exercise claims, including cases such as Sherbert, Yoder, Lee, and Goldman.\(^{301}\) An economic interpretation of the free exercise clause’s textually weak protection of religion would allow government to impose costs on the exercise of religion, but those costs could not be unreasonably high.\(^{302}\) This Comment’s economic model comports with this general interpretation of the free exercise clause.

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\(^{298}\) McConnell, supra note 36, at 14-15.


\(^{300}\) “It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with . . . witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane.” American Jewish Congress v. City of Chicago, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting).

\(^{301}\) See supra notes 91-115 and accompanying text.

\(^{302}\) See Menora v. Illinois High School Ass’n, 683 F.2d 1030, 1033 (7th Cir. 1982).
In the leading case, *Sherbert v. Verner*, the religious believer desired an exemption from a state unemployment insurance program. Mrs. Sherbert, a Seventh-Day Adventist, wanted compensation for being fired because she refused to work on her Sabbath, which was Saturday. The Court held that an exemption was compelled by the free exercise clause, yet Justice Stewart argued that such an exemption would conflict with the Court's establishment clause jurisprudence because the state would be then be required to financially aid Mrs. Sherbert's religious beliefs and practices.

Viewed in the context of this Comment's economic model, the Court would begin by examining the purported efficiency gains of the state's unemployment scheme. Unemployment compensation might be purely redistributive, which weighs against finding of efficiency. Nevertheless, by the time *Sherbert* was decided, the Court accepted the idea that unemployment compensation benefits all members of society. Thus, the scheme would probably be presumptively valid.

On the other hand, demoralization costs might exceed the common benefits of the scheme. Mrs. Sherbert and all others similarly situated might well feel upset when the state, relying on somewhat ambiguous statutory language, sends the message that its citizens' religious beliefs are not a suitable reason to warrant compensation from a fund to which they are compelled to contribute. This would be especially true where the scheme did afford a

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304. *Id.* at 401.
305. *Id.* at 399-400.
306. *Id.* at 409.
307. *Id.* at 414-15 (Stewart, J., concurring in the result). As Professor Epstein analyzes the case, the difference between Justice Brennan's majority opinion and Justice Stewart's concurrence lies in the scope of each opinion. Epstein, *supra* note 104, at 81-83 (referring to scope of unconstitutional conditions doctrine, as well as view of program). The majority is looking at the unemployment compensation scheme as a whole, whereas Justice Stewart is looking at each individual item covered by insurance. *Id.* at 84-85. For Justice Stewart, religious reasons are not covered; thus, compensation would advance religion. *Id.* at 84. However, Justice Brennan's aggregate view may be more defensible from an economic standpoint. *Id.* at 85-86. Looking at the unemployment compensation scheme as a whole, one might attempt to segregate religious believers into a separate risk pool because believers might have an extra reason for being unemployed. *Id.* at 85.

United States v. Lee, 455 U.S. 252 (1982), could be seen as an attempt by the Amish to create a separate risk pool which was rejected by the Court. See *supra* note 104. For an economic criticism of *Lee*, see Epstein, *supra* note 104, at 87-89. But in the absence of hard data, it is impossible to say whether religious believers as a class have a higher or lower incidence of unemployment. *Id.* at 85. The evidence before the *Sherbert* Court indicated that only two Seventh-day Adventists in the town were unable to find jobs which did not require Saturday work. *Sherbert*, 374 U.S. at 399 n.2. Moreover, it may prove quite difficult for the state to actually segregate believers into a separate risk pool. Epstein, *supra* note 104, at 85. Consequently, if the Court were to accord much weight to Mrs. Sherbert's dilemma, an exemption was required. *Id.*

308. *But see* *supra* note 211 and accompanying text.
similar exemption to other sects when necessary. Moreover, the state had not afforded religious believers the opportunity to obtain unemployment insurance that would compensate religiously motivated unemployment.

Furthermore, the settlement costs are likely to exceed the common gains of the scheme. Given the evidence that Sherbert-esque situations are not common, the state probably would have been better off settling the claim, rather than engaging in extensive litigation.

b. Is the specific exclusion from a government program valid?

This category of cases includes Widmar v. Vincent. One is tempted to simply state that this class of cases is generally pursued under free speech analysis, and thus “is sadly beyond the scope of this Comment.” Nevertheless, Widmar and similar cases regarding access to school facilities are so commonly associated with free exercise jurisprudence that consideration of this category under this Comment’s model is warranted.

First, a court would be required to examine the efficiency of a policy such as the one in Widmar. Here the answer is relatively easy to obtain. The increased administrative costs of excluding groups, which amounts to discrimination against certain groups, would probably render the policy inefficient and invalid from an economic standpoint.

Even if the policy were efficient, the risk of systematic exploitation associated with a discriminatory policy would be high, raising demoralization costs to an intolerable level. Moreover, even if a court were to accept the argument that the university would incur costs by allowing access to religious groups regardless of the policy’s validity, the amount of satellite litigation surrounding the access of religious groups to public fora tends to indicate that settlement costs might be high in any event.

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310. See supra note 95.

311. In particular, the employment context has generated settlement costs in the form of satellite litigation of similar issues. E.g., Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136 (1987) (involved person who converted after taking a job and was later discharged when she refused to work on her Sabbath). Hobbie is distinguishable from Sherbert insofar as the probability of conversion is probably impossible to calculate, which means that there is probably no ex ante redistribution of funds. At least there would be no redistribution among the nonreligious. There would be a shifting of funds between the nonreligious and the religious, however, unless religious believers paid unemployment benefits out of their premiums or from a segregated fund. Epstein, supra note 104 at 86.


313. See supra note 129.

314. Consideration of Widmar itself is particularly appropriate, given the references to economic concerns in both the majority opinion and the dissent. Cf. Widmar, 454 U.S. at 276 (majority does not question university’s right to make judgments on “how best to allocate scarce resources”); id. at 288-89 (White, J., dissenting) (university policy forcing students to walk “about a block and a half away” is a permissible burden, analogizing to cheapest cost-avoider argument, but not accounting for demoralization or settlement costs).

315. See supra note 129.
Thus, like the establishment clause, the free exercise clause would be somewhat altered under the economic model. Exemptions from governmental burdens on religious belief and practice would be largely upheld, perhaps even more so than recent Court decisions, so long as the claimant could show an actual religious belief or practice. Also, government would still be prohibited from excluding religious groups from public facilities via content-based regulations.

IV. Conclusion

This Comment has presented an economic model of the religion clauses of the first amendment. Admittedly, the Comment may raise many additional questions outside of those for which an answer is attempted. An efficiency-based analysis of the religion clauses would differ from the Lemon test, both in terms of their concerns and their results. While both tests would look at governmental purpose, this Comment's model would then look at the symbolic links between government and religion engendered by state action and the divisiveness that might result from those links. In terms of results, this Comment's model would perhaps be: more lenient in allowing aid to nonpublic schools; similar to the Court's analysis of tax exemptions; more stringent in the context of governmental displays of religion; and similar to the Court's results in related free speech cases. It is unlikely that this model would ever be adopted by the judicial system. Nevertheless, the Comment does present an alternative that would not place scholars of constitutional law through the jurisprudential equivalent of the Straits of Messina. Imagine that.

Karl Bade

316. See Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2933 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Just as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics... the Eighth Amendment does not incorporate the views of the Law and Economics school.") (citation omitted).