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WILL THIS PROVISION OF WELFARE REFORM SURVIVE CONSTITUTIONAL SCRUTINY?

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I. INTRODUCTION

On August 22, 1996, President William Jefferson Clinton signed legislation intended to "end welfare as we know it."[771] H.R. 3734, otherwise known as the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996"[772] (PRWORA), is designed to fix our "fundamentally broken" welfare system.[773] In many ways controversial, this Act embodies the recognition on the part of the federal government that it has failed to solve the most basic of human problems during the last half century.[774]

By transferring much of the responsibility from federal to state and local levels, PRWORA effectively dismantles the old welfare system. Under the new system, states will receive block grants for time-limited cash assistance based on particular eligibility standards. Open-ended federal entitlement programs will disappear as lawmakers attempt to promote personal responsibility and accountability, and to encourage individuals to move from welfare to work.[775]

To accomplish these goals, the new law permits states and local governments to contract directly with charitable and religious organizations to provide government-funded benefits and services to

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[771] President William J. Clinton, Statement at The White House (Aug. 22, 1996).

[772] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (a)(1)(A) (1996) [hereinafter *PRWORA*].

[773] Clinton, *supra* note 1.

[774] *See, e.g., Children, Family, Drugs and Alcoholism: Increased Private Support for Public Assistance Programs: Testimony before the Senate Labor Comm.*, 104th Cong. (1996) (statement of Senator Dan Coats) *available in* 1996 WL 166843 (F.D.C.H.). [T]he failure of bureaucratic solutions to human problems - symbolized by a 600 percent rise in violent crime and a 500 percent increase in out-of-wedlock births since the beginning of the Great Society . . . count more victims than victories." *Id.*

[775] Clinton, *supra* note 1.

needy families and individuals.[776] This so-called "charitable choice" provision is the subject of this article.

The "charitable choice" provision presents a tremendous opportunity to involve local communities in the process of reform. By promoting partnership between government and nongovernmental organizations, lawmakers may solve some of the intractable problems of welfare. But will this partnership survive challenge under the Establishment Clause of the First Amendment?

This article explores the controversy that may arise as states and local governments begin to forge business relationships with religious organizations. Specifically, this article analyzes the continuing attempt by the Supreme Court to define policy concerning these relationships. Section II begins with a discussion of Establishment Clause jurisprudence. This part traces the Supreme Court s movement from a policy of strict separation of church and state towards one based more on neutrality. Section III examines the impact of this standard on interpretation of the "charitable choice" provision. Section IV concludes by suggesting that state legislatures proceed cautiously when enacting laws under the new PRWORA provision.

II. BACKGROUND OF THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting the establishment of religion."[777] While the Clause primarily proscribes sponsorship, financial support, and active involvement of the sovereign in religious activity,"[778] it implies an even broader division, one that Thomas Jefferson described as a "wall of separation."[779]

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[776] *PRWORA, supra* note 2, at 42 U.S.C. § 604a:

(b) Religious Organizations. The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program. *Id.*

[777] U.S. CONST. amend. I.

[778] Community for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

[779] Everson v. Board of Educ., 330 U.S. 1 (1947).

The Supreme Court first described this concept in 1947 in *Everson v. Board of Education.*[780] In that case, the Court considered a state busing program that reimbursed the parents of parochial school children. Although the Court upheld the statute, Justice Black advanced the notion that the proper relationship between religion and state was one of strict separation.[781] According to Justice Black, the wall between church and state was necessary to prevent government from advancing or inhibiting any religion.[782]

Recognizing that such absolute separation is often undesirable and at times unavoidable, the Supreme Court has not remained faithful to this inflexible standard. Instead of building a taller wall, the Court has shifted towards a requirement that the government remain neutral towards religion and religious organizations.[783] As the following cases demonstrate, defining the term "neutral" is the real challenge.

A. *The Lemon Test*

After *Everson*, the leading case involving Establishment Clause jurisprudence is *Lemon v. Kurtzman.*[784] In *Lemon*, the Court devised a three-prong test for reviewing Establishment Clause challenges. First, the statute must have a secular legislative purpose;[785] second, its principal or primary effect must be one that neither advances nor inhibits religion;[786] and third, the statute must not foster an "excessive government entanglement with religion."[787] These tests have become the customary guidelines for determining when the objectives of the Establishment Clause have been impaired through government involvement in a religious activity.[788] They provide the means for ensuring that States pursue "a

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[780] *Id.*

[781] 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 that aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to follow to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State." *Id.* at 15-16.

[782] *Id.*

[783] *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985); Wallace v. Jeffree, 472 U.S. 38, 60 (1983); Walz v. Tax Comm n, 397 U.S. 664, 669 (1970).

[784] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[785] *Id.* at 612.

[786] *Id.* (quoting Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[787] 403 U.S. at 612-13 (quoting Walz v. Tax Comm n, 397 U.S. 664, 674 (1971)).

[788] Meek v. Pittenger, 421 U.S. 349, 359 (1975).

course of neutrality among religions, and between religion and nonreligion."[789]

Of the three prongs of the *Lemon* test, the last two have generated a great deal of debate.[790] While the Court is generally quick to recognize and either accept or reject the legitimacy of a statute s secular legislative purpose, it is more circumspect when contemplating "effect" and "entanglement".[791] Both elements are certain to play an important role in the constitutional analysis of the PRWORA provision.

1. The Effects Cases

The second prong of the *Lemon* analysis requires that a statute s "principal or primary effect" be one that neither advances nor inhibits religion.[792] An early case in which the Court considered this prong was *Meek v. Pittenger*.[793] In *Meek*, Justice Stewart held that the direct loan of instructional material and equipment to non-public elementary and secondary schools was unconstitutional where the schools benefitting from the act were predominantly of a religious character.[794] Justice Stewart opined that "[e]ven though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."[795] In other words, funding which knowingly or unknowingly aids religious indoctrination is unconstitutional.[796]

In a similar case, the Court held that a school district s shared time and community education programs, which provided classes to religious parochial school students at public expense also had a "primary or principal" effect of advancing religion.[797] In *School District of City of Grand Rapids v. Ball*, Justice Brennan described three ways in which the programs promoted religion.[798] First, paying instructors with state money would lead to subtle, if not overt, indoctrination of students into particular

[789] School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 382 (1984). *See also*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 747 (1976) ("Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity.")

[790] *See, e.g.*, School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Community for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[791] *See* Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[792] 403 U.S. at 602.

[793] 421 U.S. at 349.

[794] *Id.* at 349.

[795] *Id.* at 365-366 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

[796] Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

[797] School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985).

[798] *Id.* at 373.

religious tenets at public expense.[799] Second, the general public would perceive the "symbolic union" of church and state as a message of state support for religion.[800] Last, the programs' subsidy effect on the religious teaching functions of the parochial schools would necessarily advance a sectarian enterprise.[801]

These cases demonstrate the Court s concern over the primary or principal effect of government aid to religious activities. Government involvement does not however, have to be as overt as in *Meek* or *Ball*. As the Court said in *Lemon*, "[t]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'"[802] In other words, government should attempt to remain neutral by avoiding even the "appearance of endorsement."[803]

2. Excessive Entanglement

Excessive entanglement led the Court in *Lemon* to invalidate a statute providing reimbursement to private schools for teacher s salaries and instructional materials. According to the Court, any attempt to keep separate the secular from the religious would be "fraught with the sort of entanglement that the Constitution forbids."[804]

The administrative oversight requirements also troubled the Court in *Meek* and *Ball*. In both cases, the Court found the monitoring, while necessary to avoid the risk of state-sponsored indoctrination, created excessive entanglement.

Similarly, in *Aguilar v. Felton*, the Court held that a federal program which involved sending public school teachers into religious schools violated the Establishment Clause.[805] Relying on the important elements of *Lemon* and *Meek*, the *Aguilar* Court noted the religious environment in which the aid was to be provided, as well as the inspection that would be required to ensure there was no endorsement of religion.[806] The

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[799] *Id.* at 397.

[800] The court issued a similar statement in an earlier case: [T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. *Id.* at 389-390 (quoting Larkin v. Grendel s Den, Inc., 459 U.S. 116, 125-126 (1982)).

[801] 473 U.S. at 397.

[802] County of Allegheny v. American Civil Lib. Union Greater Pitt. Chapter, 492 U.S. 573, 593 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985)).

[803] 492 U.S. at 630 (O Connor, J., concurring in part and concurring in judgment).

[804] Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

[805] School Dist. of City of Grand Rapids v. Ball, 473 U.S. 402 (1985).

[806] *Id.* at 412.

"permanent and pervasive state presence" led the Court to again find excessive entanglement.[807]

It is apparent from these cases that excessive entanglement will generally be found wherever there is a government presence in a sectarian organization. Moreover, the monitoring and surveillance necessary to ensure there is no improper effect will generally lead to excessive entanglement under *Lemon*, and thus be deemed unconstitutional.

B. *The Present and Future of* Lemon

For over twenty-five years, *Lemon* has guided Establishment Clause jurisprudence. Nevertheless, several members of the Court have expressed dissatisfaction with its application.[808] While *Lemon* has not been officially abandoned, its intermittent use has created confusion and frustration even among the Justices themselves. Two cases decided in 1993 are illustrative of this point.

In *Zobrest v. Catalina Foothills School District*,[809] the Court chose not to apply the *Lemon* test. Holding that the Establishment Clause did not prohibit a school district from providing a sign-language interpreter to a deaf student at a parochial school, Chief Justice Rehnquist wrote "[w]e have never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.'"[810] Without substantive elaboration, Rehnquist continued that government programs are not necessarily subject to Establishment Clause challenge if such programs "neutrally provide benefits to a broad class of citizens defined without reference to religion. . . ."[811] The five-member *Zobrest* majority effectively ignored Lemon and the concerns of entanglement or effect on its way to deciding the case.

Surprisingly, the Court did apply *Lemon* in *Lamb s Chapel v. Center Moriches Union Free School District*,[812] a case decided just eleven days before Zobrest. In that case, the Court considered the issue of whether a

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[807] *Id.* at 413.

[808] *See* Aguilar v. Felton, 473 U.S. 402 (1985) (Burger, C.J., dissenting); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 400 (1985) (White, J., dissenting). *See also* Lamb s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Scalia, J., concurring). Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again . . . . *Id.* at 398.

[809] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[810] *Id.* at 8 (quoting Bowen v. Kendrick, 487 U.S. 589, 609 (1988)).

[811] 509 U.S. at 8. [W]e have consistently held that government programs that neutrally providebenefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit. *Id.* (citing Mueller v. Allen, 463 U.S. 388 (1983) and Witters v. Washington Dept. of Services for Blind, 474 U.S. 481 (1986).

[812] 508 U.S. at 384.

school could deny a church permission to use school facilities in order to show a religiously based film series.[813] The justices unanimously agreed that in a non-public forum, decisions regarding access must be "reasonable . . . and viewpoint neutral."[814] The Court found that the school district s refusal to allow the church to show its film was not viewpoint neutral. Because the church s use of the school property did not promote an establishment of religion under the *Lemon* test, the Court found no justification for the school district s action.[815]

The Court in Zobrest did not explicitly overrule *Lemon*. However, the failure of the Court to apply the familiar test may signal that a new method for analyzing Establishment Clause cases is forthcoming. Based on the reasoning of both *Zobrest* and *Lamb s Chapel* it is reasonable to assume that neutrality of government involvement will be the most important factor in the Court s analysis.

III. CHARITABLE CHOICE

Section 104 of the PRWORA gives states the option to contract with charitable, religious, or private organizations for the distribution of public assistance benefits.[816] The law requires that such programs be "implemented consistent with the Establishment Clause of the United States Constitution."[817] Determining which actions are permissible and which are not will turn on whether the *Lemon* test is applied or not. For the sake of argument this article will consider both scenarios.

A. *If* Lemon *is applied*

A state program in which a religious entity is empowered to administer government- funded welfare benefits is likely to fail under both the "effects" and "entanglement" prongs of the *Lemon* test. Following the line of reasoning used in *Meek* and *Ball*, any funding given to a pervasively sectarian enterprise has the impermissible effect of advancing religion. Although the charitable choice provision explicitly states that "[n]o funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization[,]"[818] indoctrination into the tenets of a particular religion is a principle mission of any church. Church-members may have trouble administering food for the body, but not for the soul. As Chief Justice Burger recognized in *Lemon*, "a dedicated religious person .

[813] *Id.* at 387.
[814] *Id.* at 392-93.
[815] *Id.* at 393-95.
[816] *PRWORA, supra* note 2, at 42 U.S.C. § 604a (a)(1)(A).
[817] *PRWORA, supra* note 2, at 42 U.S.C. § 604a (a)(2)(C).
[818] *PRWORA, supra* note 2, at 42 U.S.C. § 604a (j).

. . will inevitably experience great difficulty in remaining religiously neutral."[819]

A secondary effect of using churches as distribution points for government aid is the "symbolic union" that is created between that particular church group and the government. Even though no direct preference may be intended, the general public will perceive the cooperative effort as a symbol of government support and approval for a particular religion.[820] The "appearance of endorsement" will be inescapable.

The second reason a church/government relationship is likely to fail under *Lemon* is for "excessive entanglement." In order to ensure proper disbursement of government benefits, states will have to monitor the activities of participating religious organizations. Such monitoring will include regular audits of church accounts and regular visits to ensure the absence of religious inculcation. This continuous surveillance will create the same excessive entanglement found impermissive in *Lemon, Meek,* and *Ball.*

B. *If* Lemon *is not applied*

In many ways, states will have an even more difficult time predicting the constitutional outcome if *Lemon* is not applied. The standard outlined by Chief Justice Rehnquist in *Zobrest* requires only that benefits be neutrally provided to a broad class of citizens defined without reference to religion.[821] Certainly the class of citizens receiving public assistance is broadly defined. Because eligibility is based solely on economics, no reference to religious participation is required to qualify for government aid. But how can states neutrally provide benefits when the process of selecting a religious organization with which to contract requires some showing of preference or favoritism? Which denominations will get to participate? Which will not? Who will decide whether Catholic Charities USA or the Church of Scientology is a better organization to provide benefits? The potential for lawsuits alleging discrimination against the non-selected religions is vast.

Further, religious institutions cannot be expected to remain neutral and uninvolved. Once they become part of the process, religious groups will form their own views about welfare reform. The next step is down the slippery slope of religious involvement in the political process. Once

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[819] Lemon v. Kurtzman, 403 U.S. 602, 618 (1971).

[820] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 23 (1993). It is noteworthy that *PROWRA* prohibits both the state and federal government from requiring a religious organization to remove religious art, icons, scripture, or other symbols. *PROWRA, supra* note 2 at 42 U.S.C. § 604a (a)(d)(2)(B).

[821] *Zobrest,* 509 U.S. at 1.

sectarian groups begin to line up on either side of the argument, government will find itself stuck in the middle trying not to show favoritism by endorsing one plan over another. It is a situation which stands in stark contrast to the notion that the "Establishment Clause 'rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.'"[822] In short, as states try be involved with religion and yet remain neutral, they will learn what the framers of the First Amendment already knew: "a union of government and religion tends to destroy government and degrade religion."[823]

IV. CONCLUSION

The Supreme Court s current Establishment Clause doctrine is a quagmire of unpredictable analyses and results. Until the *Lemon* doctrine is formally replaced however, states should use the three-prong analysis for determining whether proposed legislation risks violating the Establishment Clause. Hence, the best strategy appears to be what many states are already doing: waiting. By proceeding slowly with implementation of charitable choice, states may soon see a more definitive statement by the Supreme Court.

[822] *Id.* at 23 (Blackmun, J., dissenting) (quoting Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign City, 333 U.S. 203, 212 (1948)).
[823] Engel v. Vitale, 370 U.S. 421, 431 (1962).