

# Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern

## INTRODUCTION

Clergymen<sup>1</sup> possessing confidential information gained through spiritual counseling<sup>2</sup> occasionally face legal demand to reveal the contents of such information. Clergy of all denominations have a strong aversion to disclosing confidential communications, and they frequently incur contempt citations, fines, and imprisonment rather than violate the confidence of their communicants<sup>3</sup> in a court of law.<sup>4</sup> Communications between clergymen and their communicants force the law to balance two competing policies: the need to elicit evidence important to the judicial process' search for the truth, and the desire to maintain the integrity of the religious community by protecting the secrecy of spiritual counseling.

The law has recognized the public interest in holding inviolable the confidentiality of communications between clergymen and communicants.<sup>5</sup> All fifty states and the District of Columbia have enacted clergyman-communicant privilege statutes,<sup>6</sup> which excuse clergymen from testifying in judicial

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1. The use of the masculine gender (*clergyman*) is not meant to indicate reference to males only. Since it is recognized that there are many female members of the clergy, the use of the masculine gender is used for convenience.

2. "Spiritual counseling" is the term used throughout this Note to describe the process of giving advice and comfort to religious adherents. One commentator has referred to spiritual or pastoral counseling as "processes that could properly be called confession, leading toward processes that could be called forgiveness, reconciliation or absolution." Reese, *Confidential Communication to the Clergy*, 24 Ohio St. L.J. 55, 84 (1963) (quoting R.E. Elliot, Guilt and Forgiveness, Perkins School of Theology) (unpublished manuscript).

3. "Communicant" is the term used to describe the individual who is seeking spiritual guidance. The Kansas statute, for example, defines a communicant (also referred to as "penitent") as follows:

"penitent" means a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct.

KAN. STAT. ANN. § 60-429(a)(4) (1976).

4. *E.g.*, *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931); *In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

5. The name "clergyman-communicant" is used throughout this Note to describe the privilege, although it is sometimes referred to as the "priest-penitent" privilege. The term "clergyman" is used in this context to include "ministers," "priests," "rabbis," and "religious practitioners" of all denominations. See *supra* note 3 for a definition of "communicant."

6. ALA. CODE § 12-21-166 (Supp. 1986); ALASKA CT. R., EVID. 506 (1982); ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (Supp. 1985); ARK. STAT. ANN. § 28-1001, R. EVID. 505 (1979); CAL. EVID. CODE §§ 1030-34 (West Supp. 1986); COLO. REV. STAT. § 13-90-107 (Supp. 1986); CONN. GEN. STAT. ANN. § 52-146(b) (West Supp. 1986); DEL. CODE ANN. R. EVID. 505 (1981); D.C. CODE ANN. § 14-309 (Supp. 1979); FLA. STAT. ANN. § 90.505 (West Supp. 1979);

proceedings regarding communications given to them in confidence.<sup>7</sup> While clergyman-communicant statutes have been the focus of much commentary<sup>8</sup>, the constitutionality of the statutes has seldom been challenged.<sup>9</sup> This Note will demonstrate that statutory grants of the clergyman-communicant privilege may constitute violations of the religion clauses of the first amendment.<sup>10</sup>

Part I of this Note provides an overview of clergyman-communicant statutes. Part II examines the statutes in light of the establishment clause, utilizing the current tests which the United States Supreme Court has adopted in this area.<sup>11</sup> Since establishment clause analysis will demonstrate that the statutes are unconstitutional, Part III seeks to determine whether the loss of the privilege would interfere with the clergyman's or communicant's free exercise of religion. This Note will conclude that the statutory grant of the clergyman-communicant privilege is unconstitutional and should be abolished.

GA. CODE ANN. § 38-419.1 (1981); HAWAII REV. STAT. R. EVID. 506 § 626-1 (1984); IDAHO CODE § 9-203 (Supp. 1982); ILL. ANN. STAT. ch. 110, § 8-803 (Smith-Hurd Supp. 1981); IND. CODE ANN. § 34-1-14-5 (West Supp. 1986); IOWA CODE ANN. § 622.10 (West Supp. 1986); KAN. STAT. ANN. § 60-429 (1976); KY. REV. STAT. ANN. § 421.210 (Supp. 1986); LA. REV. STAT. ANN. § 15:477 (West Supp. 1986); ME. CT. R., R. EVID. 505 (1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02 (West Supp. 1986); MISS. CODE ANN. § 13-1-22 (Supp. 1986); MO. ANN. STAT. § 491.060 (Vernon Supp. 1986); MONT. CODE ANN. § 26-1-804 (1984); NEB. REV. STAT. § 27-506 (1985); NEV. REV. STAT. § 49.255 (1986); N.H. REV. STAT. ANN. § 516:35 (Supp. 1985); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1986); N.M. STAT. ANN. § 20-4-506 (Supp. 1985); N.Y. CIV. PRAC. LAW § 4505 (McKinney Supp. 1986); N.C. GEN. STAT. § 8-53.2 (1981); N.D. R. EVID. 505 (1981); OHIO REV. CODE ANN. § 2317.02 (Page Supp. 1986); OKLA. STAT. ANN. tit. 12, § 2505 (West Supp. 1985); OR. REV. STAT. § 40.260 (1984); 42 PA. CONS. STAT. ANN. § 5943 (Purdon Supp. 1986); R.I. GEN. LAWS § 9-17-23 (1985); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1985); S.D. CODIFIED LAWS ANN. § 19-13-17 (1979); TENN. CODE ANN. § 28-1-206 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 3715a (Vernon Supp. 1986); UTAH CODE ANN. § 78-24-8 (1977); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE § 8.01-400 (Supp. 1985); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1986); W. VA. CODE § 48-2-10(a) (1986) (recognizing the privilege only in the domestic relations area); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. ANN. § 1-12-101 (1977).

7. E.g., Kuhlmann, *Communications to Clergymen—When are They Privileged?*, 2 VAL. U.L. REV. 265 (1968); Reese, *supra* note 2 at 36; Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

8. See Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—the Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967); Reese, *supra* note 2.

9. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The establishment clause is applicable to the states through the fourteenth amendment. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). The free exercise clause is also applicable to the states through the fourteenth amendment. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

10. See *infra* notes 46-118 and accompanying text.

11. Under free exercise analysis, laws which appear to violate the establishment clause may be upheld as protecting the clergyman's or communicant's free exercise of religion. In some cases, however, the state may have a compelling state interest of sufficient magnitude to outweigh the clergyman's or communicant's free exercise of religion. See *infra* notes 119-55 and accompanying text.

## I. AN OVERVIEW OF CLERGYMAN-COMMUNICANT STATUTES

An examination of the constitutionality of the clergyman-communicant privilege requires an understanding of the extent to which courts and legislatures have recognized the privilege. The scope of the privilege is governed by the law of the jurisdiction in which the clergyman is called to testify.<sup>12</sup> While the privilege was not recognized at common law,<sup>13</sup> statutes protecting communications to clergymen have now been enacted in all fifty states and the District of Columbia.<sup>14</sup> Courts have traditionally construed the statutes narrowly, protecting only communications which meet the exact conditions specified in the statutes.<sup>15</sup> In some states, however, court decisions have expanded the scope of the privilege through more liberal construction of the statutes.<sup>16</sup> The following is a brief overview of the statutes which focuses on three crucial issues presented in invoking the clergyman-communicant privilege. First, whether the communication is told to a "clergyman." Second, to whom does the privilege belong. Third, when is a communication considered "confidential."

Since there is no universal agreement as to who qualifies as a "clergyman" for purposes of the privilege,<sup>17</sup> courts generally look to the specific statutory language establishing the privilege.<sup>18</sup> Some courts also examine the doctrines of the particular denomination in question to determine whether the individual qualifies as a "clergyman."<sup>19</sup> While the traditional definition of "clergyman" includes only priests and ministers of conventional churches,<sup>20</sup> the modern trend includes as "clergy" anyone who serves as a "spiritual emissary" of the church.<sup>21</sup> As a result, the privilege in some jurisdictions has

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12. Kuhlmann, *supra* note 7, at 266.

13. Russell v. Jackson, 9 Hare 387, 391, 68 Eng. Rep. 558, 560 (Ch. 1851); Normanshaw v. Normanshaw, 69 L.T.R. 468 (1893); Seidman v. Fishburne-Hudgins Educ. Foundation, Inc., 724 F.2d 413, 415 (4th Cir. 1984); Note, *Evidence - Privileged Communications - Confession to Minister Deemed Inadmissible in Federal Criminal Proceedings*, 45 VA. L. REV. 599 (1959). *But cf.* Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (finding a developed federal common law when no statutory privilege was available).

14. *See supra* note 6.

15. *See, e.g.*, Knight v. Lee, 80 Ind. 201 (1881); Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949); Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931).

16. *See, e.g.*, Kruglikov v. Kruglikov, 29 Misc.2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961); Kohloff v. Bronx Sav. Bank, 37 Misc. 2d 27, 233 N.Y.S.2d 849 (1962).

17. *See* People v. Thompson, 133 Cal. App. 3d 419, 425-26, 184 Cal. Rptr. 72, 75-76 (1982). *See also* Yellin, *supra* note 7, at 114-21.

18. *See generally* Yellin, *supra* note 7, at 114-21.

19. *See* Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917).

20. Traditionally, the clergyman-communicant privilege was applied only to Roman Catholic priests and ministers of Christian churches. *See, e.g.*, Knight, 80 Ind. 201 (privilege denied to elder and deacon of church acting on behalf of church pastor); State v. Morehous, 97 N.J.L. 285, 117 A. 296 (1922).

21. *See, e.g.*, *In re Swenson*, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931).

been extended to draft counselors,<sup>22</sup> "elders" of the church,<sup>23</sup> nuns,<sup>24</sup> and part-time preachers.<sup>25</sup>

Although contrary authority exists,<sup>26</sup> it is well-established that the clergyman-communicant privilege, and the right to waive the privilege, belong to the communicant.<sup>27</sup> A communicant has the privilege to refuse to disclose, and to prevent another from disclosing, a communication made in confidence to a clergyman.<sup>28</sup> Under the minority view, however, the privilege is said to exist for the benefit of both parties, and the privilege as well as the right to waive it may be claimed by either the clergyman or the communicant.<sup>29</sup>

Little disagreement exists concerning the type of communication protected by the clergyman-communicant privilege. The privilege arises not because statements are made to a clergyman—it is clear that mere conversation to a member of the clergy will not invoke the privilege.<sup>30</sup> Instead, the law protects only confidential communications made to a clergyman by a person seeking penitential confession<sup>31</sup> or spiritual advice.<sup>32</sup> The communication must originate because of the confidential relationship between the two parties and it must "imply that the information should forever remain a secret in the breast of the confidential adviser."<sup>33</sup>

22. See *In re Verplank*, 329 F. Supp. 433, 436 (D.C. Calif. 1971).

23. See *Reutkemeier*, 179 Iowa at 346-51, 161 N.W. at 293; *Cimijotti v. Paulsen*, 219 F. Supp. 621 (N.D. Iowa 1963). *Contra Knight*, 80 Ind. 210.

24. See *Eckmann v. Board of Educ. of Hawthorne School Dist.*, 106 F.R.D. 70, 72 (E.D. Mo. 1985) (sister's performance of priestly functions recognized by Catholic Church and her position as spiritual advisor were sufficient to invoke the privilege).

25. See FED. R. EVID. 5-06(a)(1), Committee Note at 95 (Prelim. Draft 1969), which states: However, it (the privilege) is not so broad as to include self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, *though not necessarily on a full-time basis.* (emphasis added).

26. *Seidman*, 724 F.2d at 416 (priest-penitent privilege belongs to the clergyman, not the communicant).

27. *E.g.*, *People v. Lipszinska*, 212 Mich. 484, 493, 180 N.W. 617, 620 (1920); *In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967); *People v. Thompson*, 133 Cal. App. 3d 419, 425, 184 Cal. Rptr. 72, 75 (1982).

28. See, *e.g.*, *Thompson*, 133 Cal. App. 3d at 425, 184 Cal. Rptr. at 75. This view implies that a clergyman has no right to personally invoke the privilege.

29. *Swenson*, 183 Minn. 602, 237 N.W. 589. See also 8 WIGMORE, EVIDENCE § 2395 (McNaughton rev. 1961); CAL. EVID. CODE § 1033-34 (West Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 3715a (Vernon Supp. 1986).

30. See *United States v. Gordon*, 655 F.2d 478, 486 (1981) (testimony of priest not inadmissible where conversations with defendant related to business relationships, not spiritual matters); *United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971) (communication between injured person and pastor involved only social conversation and was not privileged).

31. *E.g.*, *Mullen*, 263 F.2d at 277; *Reutkemeier*, 179 Iowa at 346-51, 161 N.W. at 293.

32. See, *e.g.*, *Wells*, 446 F.2d at 4; *Keenan v. Gigante*, 47 N.Y.2d. 160, 166, 390 N.E.2d 1151, 1154, 407 N.Y.S.2d 163 (1979); *Puglisi v. Pignato* 26 A.D.2d 817, 274 N.Y.S.2d 213 (1966); *Kruglikov*, 29 Misc. 2d at 18, 217 N.Y.S.2d at 847. See generally Annot., 71 A.L.R.3d 794, 808-09 (1976).

33. *Swenson*, 183 Minn. at 605, 237 N.W. at 591. See also *Kruglikov*, 29 Misc. 2d at 18, 217 N.Y.S.2d at 847.

The mere fact that a communication seeking spiritual aid is made in confidence, however, does not automatically trigger the privilege. For example, the privilege ordinarily does not protect those communications made to a clergyman which are overheard by a third party.<sup>34</sup> In an effort to combat the potential inequity of this situation, some courts endorse the view that the presence of third parties does not necessarily destroy the privilege, so long as the information is given in confidence.<sup>35</sup> These courts give two reasons for this position: first, the presence of third parties does not affect the clergyman's capacity to give spiritual advice; second, the presence of third parties may be necessary "in the course of discipline enjoined by the rules or practices of such religious body."<sup>36</sup>

Many clergyman-communicant statutes require that privileged communication be made by the communicant "in the course of the discipline enjoined by the church."<sup>37</sup> While the phrase "in the course of the discipline enjoined by the church" usually refers to the rules and regulations of a religious denomination,<sup>38</sup> the phrase is subject to varying interpretations. The traditional view interprets "discipline" to mean a rule required by the religious entity.<sup>39</sup> Under this view, the privilege attaches only if the communication is required by ecclesiastical doctrine as an official ritual of the religion.<sup>40</sup> Although a minority of courts still adhere to this interpretation,<sup>41</sup> it is not the preferred construction since it is likely to favor some religions over others.<sup>42</sup> Other courts recognize that all persons seeking spiritual guidance are entitled to receive the protection of the privilege, regardless of whether such communication is required by the communicant's church.<sup>43</sup>

34. See, e.g., *People v. Diercks*, 88 Ill. App. 3d 1073, 411 N.E.2d 97- (1980) (privilege destroyed by the presence of a third party). See generally *Warshawsky, Privilege: The Rule and Its Limits*, 63 MICH. B.J. 43 (1984).

35. E.g., *Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 875; *Bolyea v. First Presbyterian Church of Wilton*, 196 N.W.2d 149 (N.D. 1972). Similarly, the presence of a third party does not necessarily destroy the attorney-client privilege. 8 WIGMORE, *supra* note 29, § 2311, at 601-02.

36. *Swenson*, 183 Minn. at 603-05, 237 N.W. at 590-91. See *infra* notes 37-43 and accompanying text.

37. E.g., ARIZ. REV. STAT. ANN. § 12-2233, 13-4062(3) (Supp. 1985); COLO. REV. STAT. § 13-90-107 (Supp. 1986); MICH. COMP. LAWS. ANN. § 600.2156 (West 1986).

38. 8 WIGMORE, *supra* note 29, § 2395, n.1; Annot., 22 A.L.R.2d 1152, 1153 (1952).

39. See *Buuck v. Kruckeberg*, 121 Ind. App. 262, 266-72, 95 N.E.2d 304, 306-07 (1950); *Ball v. State*, 275 Ind. 617, 618-24, 419 N.E.2d 137, 139-40 (1981); *Knight*, 80 Ind. at 203-04; *Johnson v. Commonwealth*, 310 Ky. 557, 559, 221 S.W.2d 87, 89 (1949). See generally *Hogan, A Modern Problem on the Privilege of the Confessional*, 6 LOY. L. REV. 1 (1951); See Annot., *supra* note 11.

40. The most clear example is that of penitential confession as required by *Codex Juris Canonici Canon 906* of the Roman Catholic Church.

41. See, e.g., *People v. Smith*, unreported case, *quoted in Privileged Communications to Clergymen*, 1 CATH. LAW. 198, 209-13 (1955); *Mullen*, 263 F.2d at 277 (stating that it would be more clear that the communication was privileged if a priest and penitent were involved "where the priest is known to be bound to silence by the discipline and laws of his church") (emphasis added).

42. See *infra* notes 97-112 and accompanying text.

43. E.g., *Swenson*, 183 Minn. at 602, 237 N.W. at 589.

As this section has illustrated, clergyman-communicant statutes often contain ambiguous language, leaving the courts with great discretion to determine which communications should be protected.<sup>44</sup> The courts are often evasive in identifying precisely why a particular communication does not fall within the protection of the statutes.<sup>45</sup> Although courts and legislatures have attempted to delineate who a "clergyman" is, to whom a confidentiality privilege belongs, and when a communication is "confidential," the outcomes of the cases are varied. Against this historical background, the constitutionality of the clergyman-communicant statutes will be examined.

## II. THE ESTABLISHMENT CLAUSE

The first amendment's establishment clause prohibits government sponsorship of religion by requiring that government neither aid nor formally establish a religion.<sup>46</sup> Additionally, it forbids government action which tends to either promote or discourage religious worship.<sup>47</sup> In its effort to define the appropriate relationship between religion and government, as required by the establishment clause,<sup>48</sup> the Supreme Court has used several tests.

The primary test which the Supreme Court employs to determine whether a government practice violates the establishment clause is the tripartite test established in *Lemon v. Kurtzman*.<sup>49</sup> While the *Lemon* test has not been mechanically applied to every establishment clause case since its adoption in 1972,<sup>50</sup> it has been characterized as the "fundamental tool of establishment clause analysis."<sup>51</sup>

### A. *The Lemon Test*

The *Lemon* test requires that the challenged government activity satisfy three criteria: first, the government activity must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion; third, it must not foster an excessive government entan-

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44. See, e.g., *Thompson*, 133 Cal. App. 3d at 426-27, 184 Cal. Rptr. at 75.

45. See *Gillooley v. State*, 58 Ind. 182 (1877); *In re Koeller's Estate*, 162 Kan. 395, 176 P.2d 544 (1947).

46. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, § 17.1 at 1031 (1976).

47. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), *reh'g denied*, 404 U.S. 876 (1971).

48. *Committee for Pub. Educ. & Rel. Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) ("It has never been thought . . . possible . . . to enforce a regime of total separation, and as a consequence cases arising under these [religion] clauses have presented some of the most perplexing questions to come before this Court.").

49. 403 U.S. 602.

50. E.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); *reh'g denied*, 466 U.S. 994 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983). See *infra* text accompanying notes 95-118.

51. *Lynch*, 465 U.S. at 696 n.2 (Brennan, J., dissenting).

gement with religion.<sup>52</sup> If the challenged government activity violates any of these three principles, it will be held unconstitutional.<sup>53</sup> Each prong of *Lemon* must be applied to the clergyman-communicant statutes in order to determine whether they can withstand the scrutiny of the establishment clause.

### 1. The Purpose Prong

The purpose prong of the *Lemon* test seeks to determine whether the state's actual purpose in enacting a clergyman-communicant privilege statute is to endorse or disapprove of religion.<sup>54</sup> If the purpose of the statute is either to promote or impede religious belief, the statute is unconstitutional even though the burden on, or the benefit to, religion may be indirect.<sup>55</sup> If, on the other hand, the state regulates conduct by enacting general laws with the purpose of advancing the state's secular goals, the statute satisfies the purpose prong of *Lemon*.<sup>56</sup>

*Everson v. Board of Education*<sup>57</sup> and *McGowan v. Maryland*<sup>58</sup> are illustrative of cases in which the Supreme Court has found a valid secular purpose. In *Everson*, the Supreme Court allowed state funds to be used to pay transportation costs of pupils attending parochial schools, a permission that certainly provided at least indirect aid to religion. The Court found that the state had a secular purpose in providing all children with transportation to and from school and that this interest benefited all children regardless of religious affiliation.<sup>59</sup> Similarly in *McGowan*, the Court held that Sunday closing laws were of a valid secular, rather than religious, character.<sup>60</sup> The purpose of the laws was to provide a uniform day of rest

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52. *Lemon*, 403 U.S. at 612-13. The *Lemon* test is actually a compilation of previous establishment clause analyses by the Supreme Court. The purpose and effect prongs were initially articulated in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). The entanglement prong originated in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

53. See, e.g., *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (per curiam), *reh'g denied*, 499 U.S. 1104 (1981). In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1983), the Court emphasized that each of the three prongs of the *Lemon* test must be satisfied independently in order for the government action to pass muster under the establishment clause.

54. *Lemon*, 403 U.S. at 612. For an example of the Court's use of the purpose prong, see *Stone*, 449 U.S. at 41-42.

The existence of a secular purpose for government action has been described by one commentator as "the most fundamental requirement in the constitutional system designed to secure religious autonomy." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 514-8, at 835.

55. For an example of indirect state aid to religion see *Everson v. Board of Educ.*, 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947).

56. *Braunfeld v. Brown*, 366 U.S. 599 (1961), *reh'g denied*, 368 U.S. 869 (1961); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

57. 330 U.S. 1.

58. 366 U.S. 420 (1961).

59. *Everson*, 330 U.S. at 4.

60. *McGowan*, 366 U.S. at 426.

for all citizens—the fact that the day was Sunday, a day of particular significance for the dominant Christian sects, did not bar the state from achieving its secular goals.<sup>61</sup>

Unlike *Everson* and *McGowan*, the state has no obvious secular purpose for enacting a clergyman-communicant privilege. Secular purposes which the Supreme Court has traditionally held to be valid usually allow for benefit to all members of the general public.<sup>62</sup> Since a clergyman-communicant privilege is available only to religious persons and is not extended to the general public, the state makes clear its intent to benefit only religious persons.

The state may, however, have a compelling interest in protecting the morality of its citizens. The privilege enables persons to seek confidential ethical guidance<sup>63</sup> which, the state claims, promotes a moral sense of well-being and leads its citizens to abstinence from future crimes and wrongdoings.<sup>64</sup> The flaw in this reasoning, however, is that even though the state may have a legitimate secular interest in protecting the morality of its citizens, the clergyman-communicant privilege benefits only moral guidance obtained through *religious* means. By advancing only *religious* moral guidance, the state runs afoul of the establishment clause.

The state may also enact a clergyman-communicant confidentiality statute in order to protect the judiciary from unnecessary clashes with religion. The state believes that without the statute, the judiciary will be in direct conflict with religion each time a clergyman refuses to testify.<sup>65</sup> The court will be forced to hold the clergyman in contempt of court and fine or imprison him, which will foster public resentment and criticism of the judiciary.

This reasoning will probably not withstand scrutiny, as the judiciary is constantly under attack from a variety of public sources. Public criticism of government is a healthy outlet for aggressions and is necessary for a marketplace of ideas to interact with one another.<sup>66</sup> The clergyman-communicant statute is probably intended to protect *religion* and *clergymen* from this confrontation, not the judiciary. Since the statute serves to directly benefit and protect religion from this public confrontation, it appears to have no secular purpose.

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61. *Id.*

62. *E.g.*, *Everson*, 330 U.S. 1 (secular purpose found in transporting children to and from school); *Sherbert v. Verner*, 374 U.S. 398 (1963) (secular purpose found in providing members of society with unemployment compensation).

63. Reese, *supra* note 2, at 60, 82.

64. Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956).

65. *See, e.g.*, *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931).

66. In *Lemon*, 403 U.S. at 622, the Court stated: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government."



Another flaw in the state's reasoning is that when a legislature enacts a testimonial privilege, it intends to protect the communication process between the involved parties, so as to benefit the environment in which this communication takes place.<sup>67</sup> When the state enacts an attorney-client privilege, it enhances the communication process between attorney and client because the client is encouraged to reveal the truth to his attorney.<sup>68</sup> This process, in turn, benefits the legal system as a whole because attorneys are better able to represent their clients when they know the truth.<sup>69</sup> Likewise, the physician-patient privilege promotes effective communication between physician and patient. In this manner, patients obtain the best medical treatment and the field of medicine is ultimately benefited because physicians can provide better medical care.<sup>70</sup> It follows, therefore, that the clergyman-communicant privilege is enacted to promote effective communication between clergymen and communicants, which ultimately benefits the entire religious community. Exempting clergymen from their civil obligation to testify in court, therefore, makes the state and religion partners in promoting religious worship, a partnership which is prohibited by the establishment clause.

Although specific legislative intent in granting a clergyman-communicant privilege is difficult to ascertain,<sup>71</sup> the constitutional analysis presented in this section indicates that a religious privilege statute is created solely to encourage religious practice.<sup>72</sup> As a result, a clergyman-communicant privilege

67. 81 AM. JUR. 2D *Witnesses* § 148 (1976) (speaking of marital privilege):

It is an established rule of common law, adopted for the protection of the institution of marriage, that neither party to a marriage may be a witness in favor of one against the other . . . [t]he design of this doctrine is to promote and encourage the utmost confidence between husband and wife and thus aid in the preservation of the marriage status.

See also *id.* at § 231 (speaking of the physician-patient privilege):

Statutes making communications between physician and patient privileged are intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and conditions . . . and are thus designed to promote the efficacy of the physician's advice or treatment.

68. *Id.* at § 172.

69. *Id.*

70. See *supra* note 67.

71. Reese, *supra* note 2, at 60.

72. The purpose in enacting clergyman-communicant statutes can be analogized to the non-secular motives found in the prayer in public school cases. In *School Dist. of Abington Township*, 374 U.S. 203 and *Engel v. Vitale*, 370 U.S. 421 (1962), the Court found no substantial secular purpose in the state requiring Bible reading and prayer in public schools. The Court rejected the argument that the state has a secular purpose in teaching morals, history, and literature. See *Stone*, 449 U.S. at 41 ("[T]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls was plainly religious in nature. . . . [N]o legislative recitation of a supposed secular purpose can blind us to that fact.").

violates the *Lemon* test by virtue of its noncompliance with the secular purpose prong, and this in itself is sufficient to show a violation of the establishment clause.<sup>73</sup> The statutes may also be analyzed, however, under the effect prong of the test, as an alternative way of finding a violation of the *Lemon* test.

## 2. The Effect Prong

The effect prong of *Lemon* asks whether, regardless of the state's actual purpose, a statute does in fact endorse or disapprove of religion.<sup>74</sup> If the immediate effect of a statute is to benefit or hinder religion, the law violates the effect prong and must be struck down. Governmental action, however, which causes only indirect, remote, or incidental benefits to religion does not violate the effect prong.<sup>75</sup> Under the effect prong of the *Lemon* test, a statute will be declared unconstitutional only if it is shown to have the effect of communicating a message of government endorsement of religion.<sup>76</sup>

When a statute is shown to violate the secular purpose prong of *Lemon*, it is usually shown to have a resulting non-secular effect.<sup>77</sup> Since, as previously discussed, the state has no secular purpose for enacting a statutory clergyman-communicant privilege, the immediate effect of the statute is to endorse religious beliefs. The analysis used to show that the state has no secular purpose in enacting the statute may also be used to demonstrate that the statute has a resulting religious effect.<sup>78</sup> A statutory clergyman-communicant privilege has the effect of establishing religion because the state has chosen to benefit religion at the expense of jeopardizing a very important secular interest. The state has a vital interest in establishing a system of justice designed to ascertain the truth.<sup>79</sup> A clergyman-communicant privilege, however, contravenes this important secular goal by excusing clergymen from their testimonial duties. While other privileges also contravene this secular interest, when a statutory clergyman-communicant privilege is involved, religion is promoted at the expense of other societal goals. A religious con-

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73. See, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) where the Supreme Court stated that "no consideration of the second or third criteria [of the *Lemon* test] is necessary if the statute does not have a clear secular purpose." *Id.* at 2490.

74. *Lemon*, 403 U.S. at 612.

75. *Nyquist*, 413 U.S. at 771.

76. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). See generally *School Dist. of Abington Township*, 374 U.S. 203.

77. See, e.g., *Larkin*, 459 U.S. 116.

78. See *supra* notes 57-72 and accompanying text.

79. See *Louisell & Crippin, Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956); *Quick, Privileges Under the Uniform Rules of Evidence*, 26 U. CIN. L. REV. 537 (1957). But see *Hogan, A Modern Problem on the Privilege of the Confessional*, 6 LOY. L. REV. 1 (1951); *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955).

fidentiality statute, therefore, has the immediate effect of promoting religion and hence violates the effect prong of *Lemon*.

### 3. The Excessive Entanglement Prong

Although a clergyman-communicant statute violates both the purpose and effect prongs of the *Lemon* test, it also violates the establishment clause under the excessive entanglement prong of *Lemon*. This prong seeks to determine whether the existence of a statute advances excessive government entanglement with religion.<sup>80</sup> Excessive governmental entanglement in religious affairs interferes with the independence of religious institutions and gives them access to governmental powers not fully shared by nonadherents of religion.<sup>81</sup>

In *Lemon*, the Court found that the government excessively interfered with religion. The state had enacted a statute to fund a salary supplement for secular teachers of non-religious subjects in sectarian schools.<sup>82</sup> The statute required comprehensive and continuing state surveillance to ensure that the teachers receiving the salary benefit did not teach religious beliefs.<sup>83</sup> Government officials were required to examine school records in order to determine the amount of the total expenditures which supported religious activities.<sup>84</sup> The Court found the provision unconstitutional because it presented a danger of excessive government entanglement with religion.<sup>85</sup> The Court feared that the state evaluation and inspection required by the aid provision would cause the sort of entanglement forbidden by the Constitution.<sup>86</sup> In invalidating the aid program, *Lemon* became the first case to use excessive entanglement as its primary justification for invalidating a law.<sup>87</sup>

The lower courts are uncertain as to the application of entanglement theory<sup>88</sup> and have applied the entanglement test inconsistently. In an effort to provide guidance in this area, the *Lemon* Court determined that excessiveness of governmental entanglement with religion is estimated by evaluating three factors. First, the character and purpose of the religious institution to be benefited. Second, the nature of the state aid to religion. Third, the resulting relationship between the state and the religious entity.<sup>89</sup>

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80. *Lemon*, 403 U.S. at 613.

81. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

82. *Lemon*, 403 U.S. at 606-07.

83. *Id.* at 619.

84. *Id.* at 620.

85. *Id.* at 625.

86. *Id.*

87. *Id.* at 602.

88. Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, LAW & CONTEMP. PROBS., Spring, 1981, at 143, 147.

89. *Lemon*, 403 U.S. at 615.

First, the Court is likely to find the character and purpose of the religious institutions which are benefited by the state's clergyman-communicant privilege to be pervasively religious. Religious indoctrination is obviously the core of these religious organizations' existence, because they are organized systems of religious faith and worship. Since the Court has found parochial schools to be pervasively religious,<sup>90</sup> it will most certainly find these organizations to be primarily religious in nature. The Court has held that if the character of the organization is pervasively religious or its purpose is religious indoctrination, the aid to these organizations is suspect.<sup>91</sup>

Second, the Court has held that if the nature of the governmental aid benefits religion directly, the aid may not be given.<sup>92</sup> Although the aid which a clergyman-communicant privilege provides to religious organizations is intangible, the privilege does provide a benefit to organized religion. The privilege helps to strengthen the moral fiber of the religious organization by giving its members peace of mind in knowing that their inner-most secrets will remain confidential. In this manner, the privilege directly aids religious organizations.

Third, if, as a result of enactment of a law aiding religion, the resulting relationship is likely to be a continuing and intimate one, the Court will find excessive entanglement.<sup>93</sup> By promulgating a religious confidentiality statute, the state is in a position to decide which religious communications should remain confidential, and which will be left unprotected by the statute. In order to make these decisions, the state will interfere with, and inquire into, the intimate disciplines of the religions in an effort to evaluate religious practices. Since a religious confidentiality statute launches state investigations into religious doctrines and provides for government surveillance of religious institutions, it leaves the state and religion closely intertwined, a result forbidden by the establishment clause.<sup>94</sup>

In conclusion, a clergyman-communicant statute violates all three prongs of the *Lemon* test because it has no secular purpose, its primary effect is to advance religion, and it fosters excessive governmental entanglement with religion. Under the *Lemon* test, a clergyman-communicant statute should be declared unconstitutional since it appears to establish religion.

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90. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975).

91. *Id.* at 362-66 (1975) (parochial schools so pervasively religious that religious aspect cannot be separated from non-religious aspect, making excessive entanglement a result); see also Comment, *Cessation of the Excessive Entanglement Test and the Establishment of Religion*, 7 OHIO N.U.L. REV. 975, 981 (1980) (aid impermissible to "pervasively religious" schools).

92. *Meek*, 421 U.S. at 363.

93. *Lemon*, 403 U.S. at 619 (excessive entanglement exists where relationship between church and state likely to be continuing and intimate); Comment, *supra* note 91, at 985 (auditing provision leads to continuing and intimate relationship between church and state which generates excessive entanglement).

94. See *Lemon*, 403 U.S. at 619.

### B. Other Establishment Clause Tests

Although the *Lemon* test is the standard primarily applied by the Supreme Court in establishment cases, the Court has referred to the test as a "mere guideline"<sup>95</sup> and has warned that it will not be bound by a single test in this area.<sup>96</sup> Even though the clergyman-communicant privilege appears to violate *Lemon*, an inquiry into other tests used by the Supreme Court is necessary to determine whether clergyman-communicant statutes violate the establishment clause.

#### 1. The *Larson* Test

While the *Lemon* test is employed to scrutinize laws which afford a uniform preference to religion over non-religion, the Supreme Court has suggested a different test for laws which are challenged as favoring some religions over others. The test articulated in *Larson v. Valente*<sup>97</sup> is employed when a law is claimed to discriminate among religions. Under the *Larson* test, the Court applies a strict scrutiny standard and proclaims a statute to be in violation of the establishment clause unless a compelling governmental interest exists, and the state is using the least restrictive means available to accomplish its objectives.<sup>98</sup>

Several states' clergyman-communicant statutes extend a confidentiality privilege exclusively to members of certain religious denominations and deny the privilege to members of other denominations.<sup>99</sup> These statutes, as typically interpreted, grant the privilege only to those members of churches which require their members to attend the Sacrament of Penance and which require their clergymen to remain silent regarding the content of confessions.<sup>100</sup> Since

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95. See *Meek*, 421 U.S. 349; *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

96. *Lynch*, 465 U.S. at 678, where the Court recognizes that a total separation of church and state is not possible and that absolutist views of the establishment clause are to be avoided. As stated by the Court: "In each case, the inquiry calls for line drawing; no fixed per se rule can be framed. The establishment clause like the due process clauses is not a precise detailed provision in a legal code capable of ready application." *Id.* at 678.

97. 465 U.S. 228 (1982). In *Larson*, the Court invalidated portions of a Minnesota law regulating charitable contributions. The challenge was directed at a provision which exempted religious organizations which received over fifty percent of their total contributions from its members from registration and reporting requirements. The Court found that the exemption scheme discriminated against churches which are "new and lacking in a constituency" or which "favor public solicitation over general reliance on financial support from members." *Id.* at 246-47 n.23. The scheme thus violated the establishment clause as it made "explicit and deliberate distinctions between different religious organizations." *Id.*

98. *Larson*, 465 U.S. at 246-47.

99. E.g., ARIZ. REV. STAT. ANN. §§ 12-2233, 13-4062(3) (Supp. 1985); COLO. REV. STAT. § 13-90-107 (Supp. 1986). See generally Reese, *supra* note 2, at 87.

100. The Sacrament of Confession is a component part of the Roman Catholic Church's Sacrament of Penance. Codex Juris Canonici, Canon 906 (1918) requires that the communicant

only the Roman Catholic Church requires its members to receive the sacrament of penance<sup>101</sup> and demands that its priests maintain a perpetual and inviolable secrecy,<sup>102</sup> only the Roman Catholic Church is protected under these statutes.<sup>103</sup>

If the state's interest in enacting the religious confidentiality statute is to protect confidential communication between clergymen and communicants and to encourage persons to seek spiritual guidance, a statute which prefers some religions over others does not effectively promote this interest. A discriminatory clergyman-communicant statute affords benefits to the favored religion which are not available to other denominations and, therefore, discourages confidential communication and religious counseling in minority denominations.

The non-favored religions are stigmatized because the existence of the confidentiality privilege gives the appearance that the Roman Catholic Church is the politically favored denomination.<sup>104</sup> When one religious denomination is given total support of the legislature, other minority religions feel coerced to conform to this politically favored religion,<sup>105</sup> for "[g]overnment endorsement of particular religious denominations sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, or favored members of the political community."<sup>106</sup>

The state does not have a compelling governmental interest for enacting a classification scheme which extends a confidentiality privilege to a communicant of one denomination but denies it to communicants of all other denominations.<sup>107</sup> The doctrine of confidentiality is nearly the same in all religions—most denominations require that the communication seeking the spiritual guidance be given in confidence.<sup>108</sup> Also, the communicant's need for secrecy is the same in all denominations.<sup>109</sup> The communicant is seeking spiritual guidance, and the Catholic seeking spiritual guidance is no more

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attend the Sacrament of Penance once a year. Codex Juris Canonici, Canon 890, sec. 2 (1918) provides that confessors are not allowed to use any information about sins obtained in the confessional in their external guidance.

101. Codex Juris Canonici, Canon 906 (1918).

102. Codex Juris Canonici, Canon 890, sec. 2 (1918). See also Macartney & Regan, *Professional Secrecy and Privileged Communications*, 2 CATH. LAW. 3, 4 (1956) (of the many secret communications thus protected, the secrecy of the confessional communications is most sacrosanct).

103. See *Swenson*, 183 Minn. at 603, 237 N.W. at 590 ("If the only 'confession' that is privileged is the compulsory one under the rules of the particular church, it would be applicable only to the priest of the Roman Catholic Church").

104. *Americans United for Separation of Church and State v. Reagan*, 607 F. Supp. 747 (E.D. Penn. 1985).

105. *Engle*, 370 U.S. at 431.

106. *School Dist. of Abington Township*, 374 U.S. 203, 226.

107. See *Reese*, *supra* note 2, at 87.

108. *Id.*

109. *Id.*

deserving of this protection than a member of any other denomination.<sup>110</sup> Communicants have the same feelings of guilt, sin, or an unscrupulous conscience regardless of which religious denomination they belong to.

Further evidence of the state's lack of compelling interest in giving a confidentiality privilege only to Roman Catholic priests is that no other privilege statutes, such as attorney-client or doctor-patient, award a privilege solely upon status. The law does not make the disciplines of a certain group of attorneys or doctors the determining factor in granting a privilege.<sup>111</sup> Instead, the nature of the relationship between the attorney and client, for example, is the sole determining factor in granting a confidentiality privilege. Likewise, in granting a clergyman-communicant privilege, the nature of the relationship between the clergyman and the communicant should be the only factor which determines whether the privilege will attach; the discipline practiced by a certain religion should be irrelevant. Those clergyman-communicant statutes which favor the Roman Catholic Church over other religions fail not only the *Lemon* test, but also the strict scrutiny analysis required by *Larson*.<sup>112</sup>

## 2. The Historical Analysis Test

Another way in which the Supreme Court analyzes government action under the establishment clause is to inquire into the intent of the framers of the Constitution. In *Marsh v. Chambers*,<sup>113</sup> the Court upheld the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state, and it did not apply any of the formal tests which have structured the Court's inquiry under the establishment clause. The Court relied on history to sustain this activity and it examined the specific features of this practice in light of a long history of acceptance of legislative and other official prayers.<sup>114</sup> The Court noted that a paid chaplain has been present in Congress since 1774,<sup>115</sup> and that seventeen members of

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110. *Id.*

111. *Id.*

112. Since the state cannot demonstrate a compelling interest for religious confidentiality statutes which discriminate between denominations, there is no need to inquire whether the state is using the least restrictive means available to accomplish its interest, which would be the second prong of the *Larson* test.

113. 463 U.S. 783 (1983).

114. *Marsh*, 463 U.S. at 786. There, the Court noted the history of a paid Chaplain in Congress. The Court viewed prayer in this context as "unique" in its historical roots. As stated by the Court:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

115. *Lynch*, 463 U.S. at 786 (discussing the *Marsh* case).

the First Congress in 1789 were also constitutional convention delegates who approved legislation providing for paid chaplains in the House and Senate. The Court concluded that the framers were obviously aware of the presence of this religious activity within Congress.<sup>116</sup> Since the framers did not explicitly declare this practice unconstitutional in the Constitution, they conveyed their endorsement of such activity.

*Marsh* is clearly an exceptional case, and few cases will fall within the realm of its holding. No evidence exists to suggest that the framers endorsed, or even considered, the clergyman-communicant privilege. The privilege was not in existence in England or the United States at the time the Constitution was drafted.<sup>117</sup> In fact, the first clergyman-communicant statute was enacted in the United States in 1828,<sup>118</sup> nearly forty years after the drafting of the Constitution. A clergyman-communicant privilege therefore cannot be upheld on the basis of *Marsh*.

### C. Summary

This Note has shown that clergyman-communicant statutes violate the establishment clause. The next step, however, is to determine whether a denial of the privilege will violate the free exercise clause. In other words, the religious confidentiality privilege might be saved from invalidity through a free exercise analysis. Statutes which appear to violate the establishment clause may be constitutional if they are necessary to promote the free exercise of religion.

## III. FREE EXERCISE CLAUSE

The free exercise clause of the first amendment protects religious practice by forbidding government interference with the free exercise of religious beliefs.<sup>119</sup> The free exercise clause also guarantees the right of every citizen to choose his own religion, free of any interference by the state.<sup>120</sup> The Supreme Court uses strict scrutiny to determine whether a statute violates the free exercise clause.<sup>121</sup> Strict scrutiny analysis in free exercise cases consists of three parts. First, the Court determines whether the state statute places a burden on the free exercise of religion. Second, if the statute infringes upon free exercise of a religious belief, the state's interference withstands

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116. For a full discussion, see Yellin, *supra* note 7, at 106.

117. *Id.*

118. *Id.*

119. Spiritual counseling is considered a "religious belief." Confidential communication to a clergyman is a religious belief if it "has reference to a penitential acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort." *In re Swenson*, 183 Minn. 602, 603, 237 N.W. 589, 590 (1931).

120. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

121. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963).



scrutiny only if the state's interest outweighs the religious interest embodied in the religious practice.<sup>122</sup> Third, the state's interest must be promoted by the least restrictive means available.<sup>123</sup>

Examination of a clergyman-communicant statute under the free exercise clause presents a novel situation. In the usual case, the state enacts a regulation which, an individual claims, interferes with the exercise of religious beliefs. In the case of a clergyman-communicant privilege, however, the statute serves as an endorsement of the principle of religious freedom because it promotes the free exercise of religion. The free exercise clause thus is triggered only if a clergyman-communicant privilege is denied. In order to analyze the free exercise implications of a clergyman-communicant privilege, the repeal of the statute granting the privilege therefore must be presumed. If the statute is mandated by the free exercise clause, then it cannot be said to be unconstitutional despite its apparent noncompliance with the various establishment clause tests.

### A. *The Burden on Free Exercise of Religion*

The first step in any free exercise claim is to determine whether a "religious" interest exists which is worthy of first amendment protection. In order to have the protection of the first amendment, free exercise claims must be "rooted in religious belief."<sup>124</sup> The Supreme Court has held repeatedly that beliefs are religious as long as they are deeply held and based upon moral or ethical principles.<sup>125</sup>

Both a clergyman's and a communicant's belief in the process of confidential spiritual healing is likely to be a belief which a court will find to be deeply based upon moral or ethical principles.<sup>126</sup> Cleansing one's soul of sins

122. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); Note, *Are Churches Above the Law? The Application of the Fair Labor Standards Act and the Equal Pay Provisions of Title VII to Religious Organizations*, 40 U. PITT. L. REV. 465, 474 (1979). In *Braunfeld v. Brown*, the Court distinguished a direct burden on free exercise from an indirect burden. See *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (Sunday closing law indirectly, rather than directly, burdened merchants' free exercise rights). The burden on merchants' free exercise rights was indirect in *Braunfeld* because the state did not act directly to prohibit the practice of religious beliefs, but merely made the practice more expensive. *Id.* at 606-07. Recently the Supreme Court rejected the direct-indirect burden distinction. See *Thomas v. Review Board*, 450 U.S. 707 (1981) (any substantial burden on free exercise must be sustained by compelling state interest).

123. See, e.g., *Thomas*, 450 U.S. 707 (inquiring into burden on free exercise, state interest, and least restrictive alternative). Since *Sherbert*, the least restrictive alternative has become a necessary component of free exercise analysis. See *Sherbert*, 374 U.S. 398.

124. *Yoder*, 406 U.S. at 215.

125. E.g., *Welsh v. United States*, 398 U.S. 333, 342-44 (1970).

126. See *Swenson*, 183 Minn. at 605, 237 N.W. at 591, where the Court states: Man, regardless of his religious affiliation, whose conscience is shrunken and whose soul is puny, enters the clergyman's door in despair and gloom; he there finds consolation and hope. It is said that God through the clergy resuscitates. The clergymen practice the thought that "the finest of all altars is the soul of any unhappy man who is consoled and thanks God."

by divulging them to a clergyman demonstrates a religious conviction which is shared by all members of the communicant's religious group. There is little doubt, therefore, that the clergyman's and the communicant's belief in the spiritual benefits obtained as a result of the sharing of confidential communication constitutes a "religious" belief.<sup>127</sup>

The Supreme Court has determined that the first amendment bars judicial evaluation of the wisdom, truth or falsity of a religious belief for any purpose.<sup>128</sup> Although the Court may not inquire into the content of religious belief, it may examine the sincerity of the belief since religious practices are entitled to constitutional protection only to the extent that the beliefs underlying them are sincerely held.<sup>129</sup> Since the Court typically conducts a sincerity analysis on a case-by-case basis, any generalization concerning the sincerity of every clergyman's and communicant's belief in spiritual counseling would be presumptuous. Since it has, however, been determined that clergymen and communicants possess sufficiently "religious" beliefs in the process of confidential spiritual communication, the beliefs are deserving of first amendment protection as long as they are sincerely held.

Since a religious interest is present in a clergyman-communicant confidentiality statute, the next step in the analysis is to determine the extent of the burden placed upon religious practice by a denial of a confidentiality privilege.<sup>130</sup> While no formal test exists for evaluating the magnitude of a burden upon religious practice, the Court requires that the burden be "substantial."<sup>131</sup> A "substantial" burden is one which greatly inhibits the practice of religion and, in effect, is a coercion to forego the practice.<sup>132</sup>

Since it is well-established that a clergyman-communicant privilege belongs to the communicant,<sup>133</sup> the interference with the communicant's free exercise rights by a denial of the privilege is especially worthy of review. From the communicant's point of view, requiring a clergyman to reveal confidential communication endangers a function essential to the practice of the communicant's religious beliefs. If the privilege is denied, a communicant will feel inhibited from disclosing confidential or personal information because there is a chance that the information may be disclosed to the public. Since the purpose of spiritual counseling is a spiritual "cleansing of the soul,"

127. See *supra* note 126 and accompanying text. See *infra* note 157 and accompanying text.

128. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965).

129. *Yoder*, 406 U.S. at 205.

130. See *supra* note 122 and accompanying text.

131. See, e.g., *Thomas*, 450 U.S. at 718.

132. As noted by the Court in *Thomas*, 450 U.S. at 717-18,

[W]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

133. See *supra* notes 27-28 and accompanying text.

the value of this communication is destroyed if the communicant is reluctant to reveal his innermost personal feelings.<sup>134</sup> A denial of the privilege burdens the communicant's practice of religion because it inhibits the seeking of spiritual guidance—an activity essential to the practice of his religion.

The communicant may also believe that the free exercise of his religious beliefs is hampered because his salvation and hope for eternal happiness is endangered by a denial of the privilege. This claim is similar to the assertion raised by the Amish in *Wisconsin v. Yoder*.<sup>135</sup> In *Yoder*, the Court recognized the Amish belief that if the state compelled Amish children to go to high school, the state would put the Amish salvation in danger.<sup>136</sup> A communicant desiring confidentiality of confessions similarly believes the Court should prohibit state interference with his religious beliefs when his salvation is at stake. Therefore, repeal of clergyman-communicant statutes for establishment clause reasons will violate the communicant's free exercise of religion.

A clergyman may likewise claim that being compelled to testify violates his conscience and sacred duty and therefore interferes with his free exercise of religion.<sup>137</sup> A clergyman who follows the law and is forced to reveal confidential communication may be punished by religious sanctions, such as denunciation or loss of religious functions and sacramental benefits.<sup>138</sup> On the other hand, a clergyman who chooses to disobey the law by following his religious convictions and refusing to testify may face secular punishment, such as contempt of court charges. Since a clergyman is forced to choose between following his religious convictions and following the law, the free exercise of his religious beliefs has obviously been abridged.

### B. *The State's Compelling Interest*

Since a denial of a clergyman-communicant confidentiality privilege burdens the practice of religious beliefs, the state must show that it has a compelling interest in denying the privilege.<sup>139</sup> Burdens on religion are tolerated by the Court whenever they are incident to regulation of other state activities and when the state's interest overrides the importance of the religious practice.<sup>140</sup> Not all burdens on religion are unconstitutional—the state may justify a limitation on religious liberty by showing that the limitation is essential to accomplish an overriding governmental interest.<sup>141</sup>

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134. For example, the value of the communication is destroyed when it is overheard by a third party. See *supra* notes 34-36 and accompanying text.

135. 406 U.S. 205.

136. *Yoder*, 406 U.S. at 207-09.

137. *In re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967), *cert. denied*, 388 U.S. 918 (1967). See *infra* text at note 138.

138. Stoyles, *supra* note 8, at 51.

139. See, e.g., *Yoder*, 406 U.S. at 214; *Sherbert*, 374 U.S. at 406.

140. NOWAK, ROTUNDA & YOUNG, *supra* note 46, § 17.4 at 1053 (1983).

141. See *United States v. Lee*, 455 U.S. 252, 256-58 (1982).

Although prior analysis under the purpose prong of *Lemon* revealed that the state has no secular purpose in enacting the clergyman-communicant privilege,<sup>142</sup> the state may have a compelling secular interest in *denying* the privilege because there may be situations where societal interest dictates that the privilege not apply. Prohibition of activities claimed to be based on, or required by, religious tenets is constitutional if such conduct jeopardizes public health, safety, or morals.<sup>143</sup>

A compelling interest which the state may claim in denying the privilege is that granting the privilege will, in certain instances, jeopardize the safety of third persons. For example, if a communicant confidentially reveals to a clergyman that he recently maliciously beat up a person and left them to die,<sup>144</sup> most clergymen would feel bound by their religious tenets to keep this life-threatening information secret.<sup>145</sup> Granting the privilege in this instance might result in the loss of a human life, while denying the privilege, even though some clergymen will still refuse to reveal the confidence, could result in the saving of a human life.

A more general state interest is that of assuring full admission of testimony for the administration of justice.<sup>146</sup> If a confidentiality privilege is granted, facts are hidden from the tribunal which, if they are revealed, will aid in the administration of justice. In *In re Williams*,<sup>147</sup> a Baptist minister was held in contempt of court and sentenced to ten days in jail for refusing to testify in a rape case. The minister believed that it would violate his moral duty as a Christian minister to testify to any matters within his knowledge concerning the matter on trial. The North Carolina Supreme Court was

142. See *supra* notes 54-72 and accompanying text.

143. See, e.g., *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (Christian Scientists' religious objections to required vaccination overruled); *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903) (parents failing to provide medical care for their children on grounds of religious belief held subject to criminal prosecution).

144. In this situation, the ordinary citizen in most states has a duty to reveal such information to law enforcement authorities. See, e.g., CAL. PENAL CODE § 32 (West Supp. 1986) which states:

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

145. *Sixty Minutes: Sacred Confessions* (CBS television broadcast, September 22, 1985) (interview with Father Lewis Gigante):

Ed Bradley: If you learned in a confession of a planned murder, would you go to the authorities?

Father Lewis Gigante: Absolutely not.

Ed Bradley: Would you go to the intended victim?

Father Lewis Gigante: Absolutely not.

Ed Bradley: But you could save a life?

Father Lewis Gigante: But I could destroy an entire institution that is sacred, and goes further than a life.

146. Cf. *Branzburg v. Hayes*, 408 U.S. 665 (1969).

147. 269 N.C. 68, 152 S.E.2d 317.

unimpressed with this position and concluded that the minister's refusal to testify was wilful, deliberate and unlawful.<sup>148</sup> The court further stated that the freedom to exercise one's religious belief is not absolute,<sup>149</sup> and that "[t]he 'compelling interest' of the state in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of the witness that for him to testify is wrong."<sup>150</sup> The state's interest in assuring full admission of testimony may therefore constitute a compelling reason for denying the privilege.

### C. *Least Restrictive Means*

The state may have an alternative manner by which to accomplish its interest in promoting fact gathering which is less restrictive to religion than denying a confidentiality privilege altogether.<sup>151</sup> If the state has an interest in establishing a system of justice aimed at ascertaining the truth, the state has a few alternatives available other than compelling clergymen to testify. The state could implement a system in which a clergyman is compelled to reveal a communication privately to the judge. If the judge determines that revelation of the information will greatly aid in the full administration of justice, he could compel the clergyman to publicly reveal the communication. In this scenario, the outcome is the same as when the privilege is denied. If, however, the judge determines that the information will not significantly further justice, the confidential communication will not be disclosed in court and will remain in the confidence of the judge and the clergyman.

This solution, however, places less of a burden on religion only when the confidential communication does not consist of information which would incriminate the communicant.<sup>152</sup> If a communicant's communication contains information regarding sins for which the state may impose a penalty, there is a chance that this information might be publicly disclosed. The possibility that this information might be revealed will deter individuals from seeking religious counsel. While *any* possibility that a communication will be revealed places a severe burden on religious practice, this alternative is nevertheless a preferred alternative to denying the privilege altogether and requiring every confidential communication to be revealed if required by the court.

Another less restrictive means available to the state is the principle of accommodation,<sup>153</sup> which is premised upon the belief that the state should

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148. *Id.* at 76-79, 152 S.E.2d at 324-25.

149. *Id.* at 79, 152 S.E.2d at 326.

150. *Id.* at 81, 152 S.E.2d at 327.

151. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (In every case the power to regulate must be so exercised as not, in attaining the permissible end, unduly to infringe the protected freedom).

152. It should be noted that use of the clergyman-communicant privilege is not limited to criminal cases. The privilege may also be invoked in civil cases.

153. Established in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (establishing the freedom of children to attend religious schools provided instruction in secular subjects meets reasonable

accommodate the religious needs of its citizens wherever possible. If the state has an interest in protecting citizens from imminent harm, there is a manner in which the state can achieve this interest and minimize the burdening of religious belief. The state could enact a clergyman-communicant privilege which includes a provision compelling a clergyman to reveal all communications which involve threats or promises of future crime or misconduct.<sup>154</sup> This provision is similar to the exception in the psychotherapist-patient privilege which provides a psychotherapist with the duty of disclosure of confidential communication if an imminent danger to the patient or society exists.<sup>155</sup> Similarly, such a provision would compel a clergyman to warn authorities or an intended victim of potential harm, while allowing the identity of the communicant to remain confidential.

#### D. Summary

Denial of a clergyman-communicant privilege places a burden on both the clergyman's and the communicant's free exercise of religion. The state, however, appears to have two compelling interests which may be sufficient

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minimum requirements of the state). Such exemptions are generally placed on the basis, *inter alia*, that as a God-fearing but tolerant people, our governments should accommodate the religious needs of its people wherever possible. Note, *Church State Religious Institutions and Values: A Legal Survey*, 37 NOTRE DAME LAW. 649, 711 (1962). The principle of accommodation was also demonstrated in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

154. It should be noted, however, that this type of statute will still probably violate the establishment clause and hence be unconstitutional. See *supra* text accompanying notes 46-118.

155. The California Evidence Code specifically denies the psychotherapist-patient privilege where there is a threat of harm to another. CAL. EVID. CODE § 1024 (West 1966). In *Tarasoff v. Board of Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), the California Supreme Court in recognizing a psychotherapist duty to disclose a patient's statements which threatened a third person, stated, "[T]he public policy favoring protection of the confidential character of the patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." *Id.* at 442, 551 P.2d at 349, 131 Cal. Rptr. at 27.

A clergyman-communicant privilege could be similarly limited. The same societal considerations which dictated non-recognition of the privilege in *Tarasoff* would dictate its denial where a clergyman is involved because religious counseling and psychoanalysis share many similarities. Indeed, it has been written that "the Roman Catholic Church is beginning to suspect a certain 'rivalry' between the practice of psychoanalysis and that of confession." E. GERGGREN, *THE PSYCHOLOGY OF CONFESSION* 16 (1975).

Another writer, in comparing the healing effects of the military chaplain with the psychologist has stated that:

An effort has frequently been made at "team ministry" or "team healing." Recognizing that there are the psychological, biological, and spiritual sides to people, hospitals are often employing chaplains and psychologists to work side by side. Industries are beginning to do the same. The military chaplains and psychologists no longer see themselves as part of separate "corps" to whom people may run in times of crises, but as significant contributors to a healthy lifestyle of individuals.

Jones, *Privileged Communication and the Military Chaplain: Some Ethical Considerations*, 1 CHAPLAINCY 15, 18 (1978).

to justify the burden placed upon religious practice. The free exercise clause therefore does not appear to mandate revival of religious confidentiality statutes when a compelling state interest is present. However, when no compelling state interest is present, the absence of the clergyman-communicant privilege appears to constitute an unconstitutional burden on the free exercise of both the clergyman's and communicant's religious beliefs.

#### IV. RECONCILING THE CONFLICT

##### A. *The Tension*

The concept of religious freedom is fraught with inherent tension because there is a natural antagonism between a command not to establish religion and a command not to inhibit its practice. If a law strictly enforces non-establishment, it risks placing a burden on free exercise of religion; if it enforces free exercise of religion, it may be accused of establishing a religion. By way of illustration, if public property is made available for a wide range of activities, but forbidden to religious activity, the law may impede the free exercise of religion. On the other hand, if public property is made available for religious worship, the government's extension of aid to religion may be outlawed by the establishment clause.<sup>156</sup> Each clause when carried to its extreme, violates the other. This irreconcilable tension between the Constitution's two religion clauses often forces the Supreme Court to choose between competing values in religion cases.

A statutory clergyman-communicant privilege appears to create an unconstitutional establishment of religion because it promotes religious practices.<sup>157</sup> Yet, as this Note has shown, the denial of the privilege may violate the clergyman's and communicant's right to freely practice religion.<sup>158</sup> The Court must seek to reconcile the conflicting provisions of the first amendment by balancing the danger of establishing religion in allowing the privilege against the danger to free exercise in refusing it. An examination into the realm of possible solutions and conflicts is necessary in order to guide the Court toward the best possible outcome.

If a religious confidentiality statute is determined to be unconstitutional because it violates the establishment clause, a clergyman called to testify could claim that maintaining confidences is a fundamental belief of his religion and that disclosure would unduly impinge upon his right to practice

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156. Bergman, *Is the Cloth Unraveling: A First Look at Clergy Malpractice*, 9 SAN. FERN. V.L. REV. 47, 49 (1981).

157. See *supra* notes 46-118 and accompanying text.

158. Assuming no compelling state interest is present. See *supra* notes 119-55 and accompanying text.

religion as guaranteed by the free exercise clause.<sup>159</sup> This argument was upheld in *People v. Phillips*,<sup>160</sup> the earliest recorded case dealing with the clergyman-communicant privilege. The *Phillips* court refused to compel a Roman Catholic priest to reveal the identity of the person who had delivered stolen goods to the priest for return to the owner. The court concluded that forcing a priest to violate the secrecy of the confessional would violate the free exercise of his religion.<sup>161</sup> This case, however, has not been followed in any other decision. In fact four years later, another court held that the ruling in *Phillips* was limited to Roman Catholic priests because Protestant churches did not make confession a sacrament.<sup>162</sup>

It is uncertain whether a court today, in the absence of a clergyman-communicant statute, would excuse a clergyman from testifying on the basis that he is exercising his freedom of religion. The court may rule that the free exercise right is overridden by the state's compelling interest in ascertaining the truth or in preventing harm to third persons. The court, on the other hand, may feel that the state's interest in this case is not sufficiently compelling to override the free exercise claim and will excuse the clergyman from testifying. When the statute does not exist, therefore, a generalized statement predicting the outcome of every case cannot be made. The court must look to the particular facts of each case and balance the competing interests involved.<sup>163</sup>

When the privilege is enacted by statute, the communication expressly spelled out in the statute is protected. When a communication to a clergyman is left unprotected by the statute, for example if the communication was not made within the discipline of the church<sup>164</sup> or if a third party was present,<sup>165</sup> a clergyman may still claim a right not to testify on the basis that he is exercising his freedom of religion. In this case, it would seem that by enacting the statute recognizing the privilege, the state has impliedly waived its interests in compelling the clergyman to testify, and the balance would be tipped in favor of upholding the free exercise claim. In reality, the state, by enacting the statutory privilege, has most likely waived only its interest in compelling a clergyman to testify regarding conversations

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159. *Id.*

160. N.Y. Ct. Gen. Sess. (1813) (The case was not officially reported. An "editors report" of the case is abstracted in 1 W.L.J. 109 (1843) and is quoted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 198 (1955)).

161. *Privileged Communications to Clergymen*, *supra* note 160, at 207.

162. *People v. Smith*, N.Y. City Hall Rec. 77 (1817) (not officially reported but an "editors report" of the case is reported in *Privileged Communications to Clergymen*, *supra* note 160, at 209). This holding would seem to resurrect the establishment clause problems mentioned under the *Larson* test. See *supra* notes 97-112.

163. See *infra* text following note 171.

164. See *supra* text accompanying notes 37-40.

165. See *supra* text accompanying note 34.



protected by the statute.<sup>166</sup> The state probably has not waived its right to compel a clergyman to testify regarding communication not protected by the statute.

In *Keenan v. Gigante*,<sup>167</sup> a priest claimed that his right to practice his religion prevented him from being compelled to reveal to the Grand Jury information told to him in confidence. The court rejected this claim, stating that the statutory privilege affords the priest any necessary protection against infringement of freedom of religion and rejected the contention that the right to practice his religion bestows more extensive protection beyond the scope of the clergyman-communicant privilege accorded by statute. Since the communication did not fall within the protection of the statute, it was not privileged. Similarly, in *In re Murtha*,<sup>168</sup> the first amendment guarantee of free exercise of religion did not prohibit the state from compelling a Dominican sister to disclose an alleged confession. The court held that the communication was not privileged under the statute because the sister's refusal to testify was not dictated by the precepts of the Dominican order, and thus was not a matter of church discipline but one of individual conscience. The court held that religious scruples must give way to dominant rights of the state to maintain peace and order.<sup>169</sup>

These courts apparently reached the conclusion that the state did not waive its right in compelling clergymen to testify regarding communication left unprotected by the statute because it was permitted to place a burden on the clergyman's free exercise of religion. If a court should ever endorse the view that by enacting the statute the state has waived all government interests in compelling any clergyman to testify, serious establishment clause implications are raised.<sup>170</sup> Since the state interests, if they are asserted, may justify a rejection of the free exercise claim, the state's waiver of its interests seems to directly benefit (or at least remove the burden from) religion. By waiving its interests, the state intends to benefit religion, which resurrects the establishment clause problems mentioned in Part II of this Note.<sup>171</sup>

### B. The Solution

The constitutionality of the clergyman-communicant statute is complicated by legal and sociological factors which are in tension with one another. To

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166. See *infra* text accompanying notes 167-169. By waiving its interest in compelling certain clergymen to testify and retaining its interest in requiring other clergymen to testify, the state seems to be discriminating in favor of some religions which violates the establishment clause under the *Larson* test. See *supra* notes 97-112 and accompanying text.

167. 47 N.Y.2d 160, 390 N.E.2d 1151, cert. denied, 444 U.S. 887 (1979).

168. 115 N.J. Super. 380, 279 A.2d 889 (1971).

169. *Id.* See also *People v. Woodruff*, 50 Misc. 2d 430, 433-34, 270 N.Y.S.2d 838, 843-44 (1966).

170. See *supra* notes 46-118 and accompanying text.

171. *Id.*

grant a confidentiality privilege causes the suppression of evidence. Since rules of evidence are designed to promote the ascertainment of truth, the judicial process is thwarted to the extent that evidence of this nature is made inadmissible. On the other side is the view that a confidence should be respected. Clergy insist that unless confidences are safeguarded, people needing spiritual assistance will be hesitant to seek guidance and society will suffer. They claim that the benefit of absolutely preserving these confidences outweighs the benefit of encouraging collection of evidence.<sup>172</sup>

Since religious confidentiality statutes violate the establishment clause, they should be repealed. The best solution is to allow each individual to invoke his own free exercise claim when he feels his rights are being infringed upon. In each case the judge will balance the harm done to the individual by revealing the communication against the harm done to society in keeping it secret. The courts should look at the danger to third parties and the harm to the other litigant which will occur by not revealing the communication.

The disadvantage of allowing courts to determine religious confidentiality privileges on a case-by-case basis is that the judge may have too much discretion to determine whether or not the communication is deserving of confidentiality. Proponents of this view believe that the legislature is better able to clearly delineate the scope of the privilege since the legislature can furnish clergymen with reasonably definite guidelines to rely upon as they perform their ministry. Allowing the courts to decide when the privilege will be invoked will have a chilling effect upon spiritual communication since persons will refrain from divulging confidential communication if they cannot be certain that it will remain confidential.

However, since involving the legislature in enacting a clergyman-communicant privilege appears to create an unconstitutional establishment of religion,<sup>173</sup> the judiciary is the best branch of government to decide when a confidentiality privilege should be invoked. The judge can best balance the two competing interests and decide which should prevail in each case. In reality, the courts would not be much more involved and given only a little more discretion than they have when the statutes are enacted.<sup>174</sup> The courts presently make the ultimate decision of deciding which communication is protected by deciding whether it fits within the statute.<sup>175</sup> While involving the courts may have some chilling effect upon spiritual communication, judicial precedent will furnish some guidelines to persons seeking spiritual guidance.

In final analysis, therefore, it should be the responsibility of the court to decide which of the two competing claims before it shall prevail: that of a

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172. See, e.g., *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931).

173. See *supra* notes 46-118 and accompanying text.

174. See, e.g., *People v. Thompson*, 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (1982). See generally *supra* text at notes 16-45.

175. See, e.g., *Thompson*, 133 Cal. App. 3d at 426-27, 184 Cal. Rptr. at 76.

state to protect its citizens from potential harm and secrets in the legal system or that of an individual to refuse obedience because of the demands of his conscience. The court, with its insight and experience is best able to struggle with and resolve the complexity of this situation.

### CONCLUSION

Few concepts have elicited so much judicial and political controversy as the religion clauses of the first amendment. The religion clauses are viewed as possessing a unitary promise of separation and freedom—separation guarantees freedom and freedom requires separation. In reality, however, the dual nature of the clauses has led the Supreme Court to command that government chart a neutral course between avoiding involvement with religion and intervening when necessary to insure free exercise of religion.

Such neutral course is often impossible to achieve, as is illustrated by clergyman-communicant privilege statutes. While the existence of the statutory privilege violates the establishment clause, the free exercise clause demands its presence.<sup>176</sup> The best “neutral course” is to declare such statutes unconstitutional and invoke a case-by-case inquiry of the privilege by the judiciary.

The courts are the best vehicle to decide which of the two claims before it shall prevail: the state’s need to elicit evidence important to the judicial process’ search for the truth or an individual’s need to refuse conformity to the laws of the state due to the sacred demands of his religion. The constitutionality of the clergyman-communicant privilege statutes will eventually be called into question by a litigant seeking to compel the revelation of a confidential communication, and the court will be compelled to examine this troublesome issue.

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176. Assuming that the state has no overriding interest in compelling the testimony.