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# Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy

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# REDEFINING THE MODERN CONSTRAINTS OF THE ESTABLISHMENT CLAUSE: SEPARABLE PRINCIPLES OF EQUALITY, SUBSIDY, ENDORSEMENT, AND CHURCH AUTONOMY

MATTHEW S. STEFFEY\*

## I. INTRODUCTION

Since 1947 the Establishment Clause<sup>1</sup> has been a substantive check on governmental activity at all levels.<sup>2</sup> More than four decades later, the content of that check remains unsettled. The United States Supreme Court gave the Establishment Clause its predominant modern voice in 1971 in *Lemon v. Kurtzman*.<sup>3</sup> Under the *Lemon* approach, all government practices are measured by the same standard. To survive constitutional attack, a practice “must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.”<sup>4</sup> In nearly all cases decided since, this standard has acted as the constitutional benchmark.<sup>5</sup> Notwithstanding its long tenure, *Lemon*’s influence is clearly waning, and its status as the principal constitutional gauge appears to be over.<sup>6</sup>

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

2. *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (holding that the Establishment Clause applied against the states by virtue of the Due Process Clause of the Fourteenth Amendment).

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

4. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (citing *Lemon*, 403 U.S. at 612-13); see also *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1973).

5. *Lee v. Weisman*, 112 S. Ct. 2649, 2663 n.4 (1992) (Blackmun, J., concurring) (“Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, 463 U.S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon*.”).

6. In *Lee*, the Court invalidated public school invocations and benedictions in Providence, Rhode Island, and formally declined to consider the continuing vitality of *Lemon*:

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. . . . For without reference to those principles in other contexts, the controlling prece-

When the Court surveyed its decisions in 1971, it concluded that the constraints of the Establishment Clause manifest themselves in terms of purpose, effect, and entanglement.<sup>7</sup> If the Court were to repeat that survey today, as it prepares to bury *Lemon*, it would discover that *Lemon* has engendered four distinctly separate prohibitions. First, a group of cases enforces familiar principles of equality. Any government regulation that employs a religious classification is subject to a heavy presumption of invalidity. In almost all circumstances, government may not impose burdens or distribute benefits on a religious basis. Thus, government cannot chose a vendor because she is an atheist or restrict the practice of law to Episcopalians. Doctrinally, the restraining principles of religious equality have close analogs to equal protection principles that enforce a norm of racial equality.<sup>8</sup>

Second, a group of cases prohibits certain government subsidies of religious activity. As a consequence, government is not free to underwrite the religious activities of religious organizations. Most notably, of course, the Court has proscribed many forms of government aid that benefit religiously affiliated elementary and secondary schools. However, broader programs that serve secular objectives and involve predominantly secular beneficiaries have routinely been allowed to provide aid to the secular activities of relig-

dents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*. . . .

*Id.* at 2655 (citations omitted).

However, Justice Kennedy's majority opinion relied on principles other than the *Lemon* standards:

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

*Id.* (citations omitted).

Moreover, four other members of the Court, Chief Justice Rehnquist and Justices White, Scalia, and Thomas, seemed poised to discard *Lemon*. See *id.* at 2685 (Scalia, J., dissenting).

7. Justice Blackmun said, "In 1971, Chief Justice Burger reviewed the Court's past decision and found: 'Three . . . tests may be gleaned from our cases.'" *Id.* at 2663 (Blackmun, J., concurring) (quoting *Lemon*, 403 U.S. at 612-13).

8. The one significant exception to the prohibition against religious classifications is that government sometimes has been allowed to facilitate free religious exercise, chiefly by exempting religion from a regulatory burden. Arguably, government attempts to promote free religious exercise conflict with the constitutional prohibition against establishment, illustrating what has been viewed as the tension between the Free Exercise and Establishment Clauses. The permissiveness of government efforts to "accommodate" religion is very much unsettled.

iously affiliated organizations. Real difficulty arises only when aid to the religious activities of religious organizations cannot be eliminated without compromising a program's objectives.

Third, another group of cases imposes limits on religious exhortations by government. Hence, a state legislature may not resolve that this is the year to bring all wayward souls. The cases in this group should be understood to silence some government speech; they do not turn on messages that emanate from general governmental policies. The cases impose limits specifically on expression; they do not merely apply a general standard in the context of expressive activity. It is from these cases that a prohibition against endorsement has derived, and it is to these cases that it should be confined.

Fourth, the final group of cases prevents government intrusion into certain central church affairs.<sup>9</sup> In one line of cases, the Court has forbidden judicial resolution of questions concerning a church's creed, governance, or discipline. Such issues are, in effect, nonjusticiable. In a second line of cases, the Court has held that restrictions on aid to parochial schools, designed to avoid unconstitutional subsidies, can unconstitutionally "entangle" government in church affairs. Specifically, the executive branch of government cannot maintain ongoing surveillance over the religious operations of these religious groups. This final group of cases thus creates a sphere where churches are autonomous.

This article is largely a doctrinal synthesis. It identifies the four doctrinal patterns into which the Court's Establishment Clause cases have settled and explores what can be learned from the fact that the Court has addressed over two decades of issues in these terms. The main conclusion is that, at its center, each of the four prohibitions guards against a very different form of government behavior. *Lemon* failed because it spoke in terms that were insufficiently focused on the differing nature of each underlying problem. *Lemon* states that government action may not have the primary effect of advancing religion, but government may advance religion in varying ways, depending on whether government acts as lawmaker, speaker, benefactor, or referee.

Looking past *Lemon*, perhaps the principal lesson is that any unitary approach is likely to prove unsatisfactory.<sup>10</sup> Coherent legal standards must,

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9. Here and elsewhere throughout the paper, I use church interchangeably with religious organization.

10. Present members of the Court have advanced proposals under which all Establishment Clause cases are decided by reference to some other single set of tests or principles other than the *Lemon* standards. Justice O'Connor would always inquire whether a reasonable observer would

at least, be sensitive to the differences between the four problems which underlie the Court's decisions to date. This paper articulates four legal tests that, unlike the *Lemon* approach, are sufficiently focused to provide a framework for deciding cases. In addition, these tests, which were generated by synthesizing the Court's decisions, salvage much of the experience gained under *Lemon*.

Two further points about the scope of this paper bear mention. First, various forms of prohibited government behavior may derive from essentially the same wrong. After all, there is just one Establishment Clause and constitutional violations might therefore be expected to share common essential features. This paper, though, does not undertake to determine the extent to which the proscriptions of the Establishment Clause are unified by a single policy or reflect some overarching constitutional value.<sup>11</sup> Ideas at

perceive that government has endorsed a religious practice or belief. *Whiters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring).

Justice Kennedy has identified:

[T]wo limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that in fact "establishes a [state] religion or religious faith, or tends to do so."

*County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).

Since *County of Allegheny*, two Justices who joined in that opinion split decidedly over what constitutes coercion. Compare *Lee*, 112 S. Ct. at 2655-61 (majority opinion of Kennedy, J.) (subtle coercive pressures adequate) with *id.* at 2683-85 (Scalia, J., dissenting) (legal coercion required).

11. Consequently, this paper cannot evaluate whether, as a normative matter, the constitutional proscriptions are right or wrong. Nevertheless, this paper has a contribution to make on that front. Debate over what the Establishment Clause ought to do is better informed by a sharper perception of what modern constitutional doctrine has done. To decide what should replace *Lemon*, if *Lemon* is indeed gone, properly begins with a clear picture of what is to be replaced.

The Court has interpreted the Establishment Clause to protect underlying religious freedoms, variously described, through intermediate buffers of neutrality toward religion and separation of church and state. Most often, the Court has identified the religion clauses as protecting freedom of conscience. See *Wallace v. Jaffree*, 472 U.S. 38, 50-51 n.35 (1985) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Prince v. Massachusetts*, 321 U.S. 158, 164-65 (1944); see also *School Dist. v. Ball*, 473 U.S. 373, 397 (1985) (holding that the Establishment Clause protects freedom of conscience and the autonomy of religious organizations).

Individual Justices have advanced other ideas. Justice Brennan has identified four purposes served by the principles of separation and neutrality: freedom of conscience; noninterference in the essential autonomy of religious life; prevention of the trivialization and degradation of religion; and avoidance of religious issues precipitating political battles. *Marsh v. Chambers*, 463 U.S. 783, 803-06 (1983) (Brennan, J., dissenting).

Chief Justice Burger has written that "the three main evils against which the Establishment Clause was intended to afford protection [are] 'sponsorship, financial support, and active involve-

that level of abstraction are simply too general to explain or decide cases.<sup>12</sup> *Lemon* is a doctrinal statement designed to provide a framework for deciding cases, and this article examines *Lemon's* legacy with this particularly in mind. Moreover, a single constitutional standard may be ill suited for identifying even a single wrong which manifests itself in various contexts.<sup>13</sup>

Second, the four essentially separate restraining principles were developed in four contexts which are likewise essentially different. This does not mean, necessarily, that a given principle *must* stay confined to its present

ment of the sovereign in religious activity.'" *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

Justice O'Connor has described the common purpose of the Establishment and Free Exercise Clauses as protecting "religious liberty." *Wallace*, 472 U.S. at 68 (O'Connor, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

12. See, e.g., John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 848, 906 (1984) (Ultimately, for "the satisfactory resolution of problems under the religion clauses, it is necessary to explore and expound a philosophy of the Constitution regarding human nature, human destiny and other realities," from which, among other things, "intermediate principles [actually] useful in deciding particular questions" can be derived.).

13. To eat too much dietary fat can cause obesity, high blood cholesterol, and heart disease, yet a scale alone is an insufficient diagnostic tool. For scholarly attempts to articulate a generally applicable constitutional standard, see, e.g., Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, at n.21 (1990) (Establishment Clause issues are essentially Equal Protection problems); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) (Two proposed standards, one for evaluating religious practices in public schools, and one for evaluating financial aid to religious institutions, "encompass a single principle: The establishment clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs."); Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677 (arguing for a "meaningful secular purpose test—through more careful scrutiny of governmental purposes and motivations—within the framework of the *Lemon* test"); Rosalie Berger Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U. L. REV. 707, 726 (1984) (Proposing two standards: 1) "Where government provides financial assistance to religious entities the purpose must be secular and the assistance must be uniformly provided;" and 2) "Where government permits religion to intrude into the public realm or it otherwise acts for a religious purpose, it must meet strict scrutiny analysis."); Gary J. Simpson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987) (proposing modifications to the *Lemon* standards); see also Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1172-87 (1988) (The Court's Establishment Clause cases defensibly embody a separationist theme and a subtheme of allowing certain traditional government practices which favor religion). But see Philip E. Johnson, *Concepts and Compromise in First Amendment Doctrine*, 72 CAL. L. REV. 817 (1984) (Religion Clause doctrine is "radically indeterminate," and "we ought not to be shocked at the frank acknowledgement that our attitudes about religious truth and the social value of prevailing religious practices influence how we chose to interpret the Constitution's mysterious phrases.").

context. Much of this article evaluates the extent to which one proscription would have utility outside its present parameters.

The discussion is organized as follows. Part II A through D separates the cases according to which of the four basic problems they involve, and defines the doctrinal proscriptions applicable to each. Part II E examines the notable places where two or more of the problems might be seen to overlap. For instance, when government supports the religious speech of a private speaker, it might arguably provide an undue subsidy and might present a case marginally within the endorsement paradigm. This section notes that the points of intersection create no real incongruity and that the four problems and their corresponding restraining principles are essentially separable.

Part III contains concluding remarks. In summary, it ties the four constraints to core Establishment Clause concerns and finds that, in many respects, the restraints of the Establishment Clause have expanded neither far—*nor incoherently*—beyond these core issues. Finally, the article recasts the restraints of the Establishment Clause into four legal tests that respond sensitively to their corresponding animating concerns.

## II. THE FOUR CONSTITUTIONAL CONSTRAINTS IN CONTEXT

### A. *When Government Acts as Lawmaker: Principles of Equality That Restrain Use of Religious Classifications*

When government enacts a law imposing regulatory burdens or distributing benefits, it must identify the persons or activities subject to the burden and the persons or activities entitled to the benefits. As the cases in this section demonstrate, the constitutional command of disestablishment presumptively forbids government from using religion as the basis for receiving benefits or shouldering burdens. That presumption is strongest when government differentiates among religious denominations.<sup>14</sup> Further, for most matters, religious and analogous conscientious secular interests are often said to have the same constitutional stature; thus, discrimination on the basis of religion generally bears a heavy burden of justification. Further still, once a plausible justification is offered to support a religious classification, the regulation that uses the classification is examined with care.

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14. Even Chief Justice Rehnquist, perhaps the Court's strongest proponent of the validity of government benefits to religion generally, finds that the Establishment Clause forbids sectarian preferences. See *Wallace v. Jeffries*, 472 U.S. 38, 106, 113 (Rehnquist, C.J., dissenting).

These controlling Establishment Clause rules can be explained by reference to principles of equality imported from the Equal Protection Clause.<sup>15</sup> At its center, the constitutional principle of racial equality forbids government from using race as the basis for governmental action. Government may not hand out benefits or impose burdens on the basis of race absent a reason of overriding importance.<sup>16</sup> Even then, that reason must be closely served by the government action.<sup>17</sup>

The constitutional principles of religious equality can be seen by reference to three elemental features of the cases. A regulation is infirm if:

- (1) It purposefully employs a religious classification, either among religions or between religion and analogous secular activity; and
- (2) it lacks a sufficiently weighty justification; or
- (3) it is an insufficiently precise means toward the otherwise justified objective.

The following sections address each of these elements in turn.<sup>18</sup>

15. The Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend I.

16. The Constitution is offended even when benefits are purportedly equal. See *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

17. Cf. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.) (All racial classifications, even those employed in "affirmative action" programs, are subject to strict scrutiny, which "ensures that the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." To remedy societal discrimination is an insufficient justification. To remedy the present effects of past discrimination would suffice.); *id.* at 524 (Scalia, J., concurring) ("In my view there is only one circumstance in which the State may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."); *id.* at 535-39 (Marshall, J., dissenting) ("[R]ace-conscious classification designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand constitutional scrutiny.' To remedy societal discrimination is a sufficient justification.); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring) (The Court's Equal Protection analysis, in essence, seeks to determine whether a given classification has a sufficiently rational basis. Race and gender, for instance, usually do not. "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.").

18. A word on the focus of this discussion is in order. This section argues that much of the Court's precedent can, in fact, be understood as enforcing principles of equality closely aligned with equal protection principles. Indeed, the point of this discussion is that much Establishment Clause jurisprudence is reasonably comprehensible if viewed this way. It is not, however the point of this paper to evaluate the extent to which Establishment Clause principles should turn on notions of equality, borrowed from the Fourteenth Amendment or otherwise.

For thought on the proper role of equality and the Equal Protection Clause in Establishment Clause cases, see, e.g., John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP.

1. A government regulation purposefully employed a religious classification, either among religions or between religion and analogous secular activity.

As a threshold matter, regulation must purposefully employ a religious classification. The classification may be explicit: On its face the law may distinguish between religious and other activity. The classification may also be implicit: On its face the law may appear neutral, yet a religious classification lurks in disguise. There are two types of explicit and implicit religious classifications: Those that discriminate among religious denominations; and those that discriminate on the basis of religion generally.<sup>19</sup>

Classifications that discriminate on the basis of religion generally account for all but one case in this group. A Texas law exempted certain religious publications from state sales and use tax;<sup>20</sup> section 702 of the Civil Rights Act of 1964 exempts religious organizations from Title VII prohibitions against discrimination on the basis of religion;<sup>21</sup> a Connecticut law granted employees an absolute right not to work on their chosen Sabbath;<sup>22</sup> a Kentucky law excluded ordained ministers from public office;<sup>23</sup> and a Massachusetts law allowed churches and schools to veto certain liquor license applications.<sup>24</sup>

In addition, the Court has reviewed one law that it found discriminated among religious denominations. In *Larson v. Valente*,<sup>25</sup> a Minnesota statute conditioned the right of charitable organizations to solicit funds on

CT. REV. 193; Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1 (1992); Brownstein, *supra* note 13, at n. 21 (1990); Philip Kurland, *Of Church and States and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 982-87 (1989) [hereinafter Lupu, *Where Rights Begin*]; Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution* 18 CONN. L. REV. 739 (1986) [hereinafter Lupu, *Keeping the Faith*]; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 612 (1986); Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373.

19. Presumptively, the Establishment Clause can be seen to require what has been termed "formal neutrality." See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). This principle, however, falls short of a complete ban on religious classifications proposed long ago by Professor Kurland. See Kurland, *supra* note 18.

20. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

21. *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints Corp. v. Amos*, 483 U.S. 327 (1987).

22. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

23. *McDaniel v. Paty*, 435 U.S. 618 (1978).

24. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

25. 456 U.S. 228 (1982).

compliance with extensive registration and reporting requirements.<sup>26</sup> The statute exempted religious organizations, but only those that received more than fifty percent of their contributions from members or affiliated organizations.<sup>27</sup> Justice Brennan, writing for a five-member majority, found that the fifty percent rule was drafted precisely to include particular religions and exclude others.<sup>28</sup>

## 2. The regulation lacks a sufficiently weighty justification.

If a regulation embodies a religious classification, the next issue becomes whether that regulation is adequately justified. The range of sufficient justifications is an important gauge of the strength of the governing principles of equality. For instance, because the most fundamental Establishment Clause principle is that government may not favor one religious denomination over another, a sectarian preference may be validated only by a justification of the highest order.<sup>29</sup>

The Court has never identified the strength of the government interest required to justify a nonsectarian religious classification. This is no surprise, inasmuch as government interests have no explicit place under *Lemon*. In practice, however, the Court has found only one justification acceptable: removal of a barrier to religious exercise or a burden on religious practice.<sup>30</sup>

Most notably, in *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints Corp. v. Amos*,<sup>31</sup> the Court upheld section 702 of the Civil Rights Act of 1964, which exempts religious organizations from the Title VII provisions prohibiting employment discrimination based on religion.<sup>32</sup>

26. *Id.* at 230-31.

27. *Id.*

28. *Id.* at 254. The Court rejected the argument that the statute simply had a "disparate impact" on certain sects. Rather, the law "makes explicit and deliberate distinctions between different religious organizations," and favors established over new churches. *Id.* at 246-47 n.23. Earlier statutory language was revised when legislators perceived that a Roman Catholic Archdiocese would not fit the exemption. *Id.* at 254.

This approach is consistent with the Court's race discrimination jurisprudence. To implicate the Constitution, government must act on a discriminatory purpose. To show a disparate impact on the disadvantaged group is insufficient. Government must be said to act because of, not in spite of, the disparate effect. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

29. *Larson*, 456 U.S. at 246. No present Justice has challenged the idea that sectarian preferences can violate the Establishment Clause.

30. See *infra* notes 31-63 and accompanying text.

31. 483 U.S. 327 (1987).

32. *Id.* at 330. Amos worked for a nonprofit gymnasium operated by two religious organizations and was fired because he was not a member of the Mormon Church. *Id.*; see also 42 U.S.C. § 2000e-1 (1988).

The Court specifically validated the purpose of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions . . . [and] minimiz[ing] governmental interfer[ence] with the decision-making process in religions."<sup>33</sup> Government was therefore allowed to remove a burden of its own creation.<sup>34</sup>

By contrast, in *McDaniel v. Paty*,<sup>35</sup> the Court struck down a Kentucky law that excluded ordained ministers from public office. To prevent a political rift along religious lines was an unsatisfactory justification. As Justice Brennan said, concurring: "The establishment clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."<sup>36</sup> In sum, religion has been acceptably relevant to use a regulatory proxy only when government has sought to remove a barrier to religious exercise or a burden on religious practice.<sup>37</sup> On most fronts, then, the principle of disestablishment is quite strong. Whatever can be said of the difficulty of comparing the importance of governmental inter-

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33. *Amos*, 483 U.S. at 335-36 (quotations omitted). Whether these reasons suffice to justify the religious preference is a much more sensible inquiry than whether the preference had the principal effect of advancing religion. In *Amos*, the Court avoided the literal language of the second prong of *Lemon* by finding that the advancement of religion was attributable to the church, not the government. "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337 (emphasis in original). The Court noted that since the gym was a nonprofit institution, and § 702 did not allow the church to extend its influence into the commercial world, there was no evidence that the Civil Rights Act increased the church's ability to send its religious message. *Id.* Likewise, any pressure threatening discharge of an employee to join the church could not be attributed to the government. *Id.* at 337-38 n.15.

34. *See Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (construing the Federal Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988)). Under the Act, if a public secondary school maintained a "limited open forum," it could not discriminate against religious or other speech. *Id.* at 235. Eight Justices accepted the plurality's determination that the predominant secular purpose of the Act was to prohibit discrimination against religious and other types of speech. *Id.* at 242. A majority also concluded that the act was otherwise consistent with the Constitution. *Id.* at 253; *see infra* notes 253-58, 262 and accompanying text. *See also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-46 nn.10-11 (1987) (concluding summarily that to require a state to provide unemployment compensation benefits to an employee fired because she refused to work on her Sabbath did not violate the Establishment Clause; rather, such a policy permissibly accommodates religious practice); *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981) (summarily concluding that to compel unemployment compensation benefits be paid to a Jehovah's Witness whose religious beliefs led him to terminate his employment did not violate the Establishment Clause. Instead, that course demonstrated neutrality toward religious differences.).

35. 435 U.S. 618 (1978).

36. *Id.* at 641 (Brennan, J., concurring).

37. Of course, religious affiliation is, by definition, relevant when a burden is allegedly caused by the demands of one's religion.

ests, to protect free religious exercise is of constitutional or near constitutional stature.<sup>38</sup>

These cases thus squarely confront the legitimacy of government efforts to facilitate or accommodate religious exercise—government efforts to reconcile religious practices with its regulatory interests, or with conflicting demands in the world at large.<sup>39</sup> How easily government can overcome the presumption against religious classifications will depend on the latitude government is given to afford religious exercise exceptional treatment.<sup>40</sup> In

38. On the subject of identifying “compelling” governmental interests, see Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

39. This is often termed “accommodation” of religion. Ira Lupu has defined accommodation, in part, as: “actions taken by the state or its agents that . . . respond affirmatively to religion based claims for exceptional treatment, which would not be afforded but for the religious quality of the claims or the religious character of the institution(s) advancing the claims.” Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 559 (1991). He excludes from the definition actions required by the Free Exercise Clause. While there seems to be no dispute that government must provide exceptional treatment mandated by the Free Exercise Clause, Professor Lupu has argued that only the judiciary is competent to afford the necessary exceptional treatment. *Id.* at 599-609.

After the Court’s latest Free Exercise Clause decision, *Employment Div., Dep’t of Human Resources v. Smith*, 495 U.S. \_\_\_, 110 S. Ct. 1595 (1990) [*Smith*], it seems that little, if any, exceptional treatment will be constitutionally required. In *Smith*, two members of the Native American church were fired from their jobs as counselors with a private substance abuse rehabilitation organization because they ingested peyote at a church ceremony. *Id.* at 1597. Subsequently, they were denied state unemployment compensation benefits because they were dismissed for work-related misconduct. *Id.* at 1598. When the case worked its way up to the Supreme Court for the first time, the Court remanded for the Oregon Supreme Court to determine whether the employees’ conduct violated the state’s criminal drug laws. See *Employment Div., Dep’t of Human Resources v. Smith*, 485 U.S. 660, 673-74 (1988). The Oregon Supreme Court held that the employees conduct was indeed criminal, but that the Free Exercise Clause privileged their behavior. *Smith v. Employment Div., Dep’t of Human Resources*, 763 P.2d 146, 148 (Or. 1988). In reviewing this decision, the Supreme Court held that the Free Exercise Clause, by its own force, does not exempt religiously motivated acts or abstentions from the operation of a neutral, generally applicable criminal statute. Rather, the free exercise clause protects only against those government acts that regulate “religious beliefs as such” or that seek “to ban [religiously motivated] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.” *Smith*, 110 S. Ct. at 1599.

40. The *Smith* decision is critically important on this point. *Smith* held that, by itself, the Free Exercise Clause never compels a judicially created exemption from the incidental burdens of a neutral, generally applicable state criminal law. *Smith*, 110 S. Ct. at 1599. Moreover, there is no reason to believe that *Smith* will be limited to state criminal laws. As a consequence, if religious exercise is to be accommodated, it will only be by legislative or executive action which employs a religious classification.

Perhaps most significantly, *Smith* suggested that a legislatively crafted exemption was the appropriate way to lift burdens on religiously motivated acts and abstentions like the peyote use at issue in that case. *Id.* at 1606. See also *Bullock*, 489 U.S. at 18, n.8 (plurality opinion of Brennan, J.) (“[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire . . .

doctrinal terms, the question is how much deference will the Court give to determinations by government that a given burden on religious practice is a sufficient justification and that the law is sufficiently well crafted toward the elimination of that burden. In a sense, future cases will turn on the extent to which Establishment Clause or Free Exercise Clause values predominate.<sup>41</sup>

### 3. The Regulation Is an Insufficiently Precise Means Toward the Otherwise Justified Objective of Lifting a Burden on Religious Exercise.

The strength of the principle of equality is also evinced in the Court's invalidation of laws that make use of religious classifications on the grounds that they were crafted with insufficient care; in doctrinal terms, the regulation was not narrowly tailored to the purpose of lifting a burden on free religious exercise. Several times the Court has concluded that government could have facilitated free religious exercise in a manner that would have avoided the need to use the religious classification, or avoided some other undesirable feature of the regulation.<sup>42</sup> These cases thus restrict the government's latitude to depart from the norm of equality.

This tailoring requirement is readily apparent in *Larson v. Valente*.<sup>43</sup> At issue was a Minnesota statute that conditioned the right of charitable organizations to solicit funds on compliance with extensive registration and re-

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that exemption presumably would not be invalid under the establishment clause even though this Court has not found it to be required by the free exercise clause."); *id.* at 29-33 (Scalia, J., dissenting) (A state's discretion to accommodate religion is much broader than the commands of the Free Exercise Clause).

41. As should be apparent, this Article does not attempt to enter the extensive debate over the permitted scope of government accommodation of the free exercise of religion. See, e.g., Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause*, *supra* note 30, at n.6, 7; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1 (1985); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991); Mark Tushnet, *The Emerging Principle of Accommodation of Religion*, 76 GEO. L.J. 1691 (1988).

42. *Cf.* U.S. v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion of Brennan, J.) (citation omitted) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.").

43. 456 U.S. 228 (1982).

porting requirements.<sup>44</sup> The statute exempted only those religious organizations that received more than fifty percent of their contributions from members or affiliated organizations.<sup>45</sup> The Court found that this fifty percent rule was a denominational preference, created for the specific purpose of including particular religions and excluding others.<sup>46</sup> As such, it violated the Establishment Clause's "clearest command: that one religious denomination cannot be officially preferred over another."<sup>47</sup> The Court ruled that a law which conflicts with this central principle is judged not by *Lemon*, but under strict scrutiny. Strict scrutiny, of course, requires that the law be "justified by a compelling governmental interest" and be "closely fitted to that interest."<sup>48</sup> Here, even assuming the importance of the need to protect the public against abuse in the solicitation of charitable contributions, Minnesota failed to carry its burden in proving that this purpose was closely served by the sectarian classification.<sup>49</sup>

The requirement of a tight fit between means and ends explains the decision in *Estate of Thornton v. Caldor, Inc.*<sup>50</sup> In *Caldor*, the Court invalidated a Connecticut law that granted employees an absolute right not to work on their chosen Sabbath.<sup>51</sup> Chief Justice Burger, writing for the majority, emphasized the unqualified nature of the law and concluded that it advanced religion as prohibited by the second prong of *Lemon*:<sup>52</sup>

In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no

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44. *Id.* at 230-31. All charitable organizations covered by the law had to register with the Minnesota Department of Commerce and file an annual report identifying total income, expenses of management, fundraising, and education, and how much money went to out-of-state-recipients and for what reason. *Id.* at 231. In addition, the Department of Commerce was authorized to withdraw registration if to do so would be in the public interest and if the organization engaged in fraud or deceit. *Id.* Further still, an organization was ineligible to maintain its registration if it spent an unreasonable amount (presumptively 30% or more) for management, general, and fundraising costs. *Id.*

45. *Id.* at 231-32.

46. *Id.* at 254.

47. *Id.* at 244.

48. *Id.* at 252 (stating that *Lemon* applies when a law affords a uniform benefit to all religions).

49. *Id.* at 247.

50. 472 U.S. 703 (1985).

51. *Id.* at 708.

52. *Id.* at 710-11.

account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.

....

There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule—a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.<sup>53</sup>

Hence, even if the regulation was justified as one that relieves a burden on religious exercise, the law was nevertheless constitutionally infirm because it made insufficient provision for the competing interests of the employer and other employees by imposing an undue burden upon third parties. Consideration of the burdens placed on third parties is an ordinary part of the tailoring requirement when an otherwise permissible racial classification is reviewed under the Equal Protection Clause.<sup>54</sup>

The Court has also invalidated a religious classification as under-inclusive. In *Texas Monthly, Inc. v. Bullock*,<sup>55</sup> the Court struck down a Texas law exempting from the Texas sales and use tax "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."<sup>56</sup>

Five Justices, in two opinions, concluded that the exemption offended the Establishment Clause. However, neither opinion defines equality principles as controlling. Rather, both opinions focus on the message sent by

53. *Id.* at 709-10 (footnote omitted). Justice O'Connor concluded that the law had an impermissible effect because it sent a message of endorsement of Sabbath observance. *Id.* at 711 (O'Connor, J., concurring). Justice O'Connor also placed emphasis on the absolute nature of the preference, thereby distinguishing the law from a "reasonable accommodation" that would send a message of antidiscrimination, not endorsement. *Id.* at 712.

54. *E.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion of Brennan, J.) (stating that burden on third parties is an important inquiry); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (Powell, J.) (reviewing court-ordered remedy for racial discrimination).

I therefore think that the distinction between the accommodation required in this case and the accommodation demanded of employers by Title VII is defensible. *Contra Lupu, Keeping the Faith*, *supra* note 18, at 748, 749 (This distinction "cannot bear the constitutional weight assigned to it.).

55. 489 U.S. 1 (1989).

56. *Id.* at 5 (quotations omitted).

the Texas Legislature.<sup>57</sup> Nevertheless, it is clear that inequality was at the root of the constitutional violation. All five Justices recognized that a more inclusive exemption could pass constitutional muster.<sup>58</sup> All agreed that an exemption that eliminated the viewpoint bias and included nonreligious organizations would be unobjectionable.<sup>59</sup>

*Larkin v. Grendel's Den, Inc.*<sup>60</sup> can also best be understood by reference to this tailoring requirement. In that case, the Court struck down a state statute that gave churches, as well as schools, the power to veto applications for liquor licenses for establishments within a 500-foot radius of the location of the church or school. The Court accepted the state's interest as one that protects religious exercise. In other words, a state could regulate the environs around a church to zone out inconsistent uses.<sup>61</sup> Nevertheless, the veto was an unacceptable means toward this end. The Court found that delegation of this power threatened the Murray separation of church and state in two ways. First, exercise of the veto was subject to no standards, and thus the power could be used not just to insulate the church from undesirable neighbors, but to forward religious goals, too.<sup>62</sup> Second, the "appearance of a joint exercise of legislative authority" formed a forbidden symbolic link between church and state.<sup>63</sup>

Although the Court spoke in terms of advancing religion and endorsement,<sup>64</sup> the case is much more coherent if understood by reference to the elements outlined in this section. The government had a satisfactory reason to employ a religious classification. The law was nevertheless unconstitutional because government could have served this end while avoiding the perceived constitutional evils. The Court suggested that the law's valid objectives could be accommodated by other means, such as "an absolute legislative ban on liquor outlets within reasonable prescribed distances from

57. See *id.* at 15 (opinion of Brennan, J.) (focusing on a message of endorsement and sponsorship sent by the exemption); *id.* at 28 (Blackmun, J., concurring) (focusing on endorsement).

58. Cf. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating over-inclusive classification).

59. See *Texas Monthly*, 489 U.S. at 15-16 (opinion of Brennan, J.).

60. 459 U.S. 116 (1982).

61. Specifically, the Court stated:

[S]chools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning law.

*Id.* at 121.

62. *Id.* at 125.

63. *Id.* at 125-26.

64. *Id.* at 125.

churches, schools, hospitals, and like institutions, or by ensuring a hearing for the views of affected institutions at licensing proceedings."<sup>65</sup>

*B. When Government Acts as Financier: Prohibited Subsidies*

The Court has long viewed an unrestricted financial subsidy to a church as forbidden, even if the subsidy were available to all churches. Hence, a city cannot give \$100,000 to the local Roman Catholic Parish or \$10,000 to all local churches.<sup>66</sup> This is true even if the city claims it is motivated entirely by a desire to forward the churches' secular humanitarian aims.<sup>67</sup> As a doctrinal matter, the principles of equality evinced in the cases in the foregoing group would serve to invalidate aid reserved for religion, without regard to the nature of the benefit provided.

The Court has also long believed that an unequal subsidy is not the only prohibited kind of subsidy. Rather, some forms of "direct" and "substantial" aid to religion have been deemed unconstitutional. The cases suggest that the Establishment Clause contains a ban on all "direct" government assistance used by its recipient *specifically* to sustain religious activity.<sup>68</sup> In addition, some "indirect" assistance can be unconstitutionally substantial: The cases suggest that there is a limit past which government cannot underwrite the secular costs of operating an organization with both secular and religious purposes.<sup>69</sup> The Constitution thus prohibits two types of religious subsidies: those that specifically underwrite religious activity, and those that more generally and broadly support a religious organization.<sup>70</sup> There is no

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65. *Id.* at 124 (footnotes omitted).

Justice Brennan's concurring opinion in *Amos* also illustrates the tailoring requirement at work in these cases. Although not at issue in *Amos*, Justices Brennan and Marshall argued that all secular activities of religious employers cannot be exempted from Title VII's prohibition against religious discrimination. An individual's freedom of conscience is threatened when government allows employers to require employees to choose between religious beliefs and a job. The autonomy of religious organizations, however, is threatened when they cannot order their affairs. An organization's interests outweigh an individual's with regard to the religious activities of religious organizations, but not with regard to secular activities. In sum, as to a religious employer's secular activities, the burden on third parties is too great to justify an exemption.

66. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

67. *See* *School Dist. v. Ball*, 473 U.S. 373, 382 (1985).

68. The Court has maintained that "the [Establishment] Clause . . . absolutely prohibit[s] government-financed or government sponsored indoctrination into the beliefs of a particular religious faith." *Id.* at 385 (citations omitted).

69. The Court has further maintained that "the Establishment Clause prohibits forms of aid that provide direct and substantial advancement of the sectarian enterprise." *Id.* at 396 (citation omitted).

70. There has been substantial agreement among members of the Court that the Establishment Clause has been read to contain these prohibitions. *See id.* at 399-400 (O'Connor, J., concurring in part and dissenting in part); *see infra* notes 73, 82-83, 105 and accompanying text

dispute that churches may benefit, like any member of the public, from many generally available government services. Religion may enjoy at least some "incidental" benefits like anyone else.<sup>71</sup> Therefore, a city need not exclude a church from city fire or police protection. This is true even though a church's purely religious aims are more easily advanced when it need not divert effort from the saving of souls to the prevention of fires.<sup>72</sup>

The problem, of course, is that not every constitutionally permissible benefit necessarily is analogous to fire protection and not every unconstitutional benefit necessarily appears as a donation. Nonetheless, the constitutional restraints can be most sensibly understood if viewed as attempts to guard against religious offerings by government.<sup>73</sup> Viewed this way, it is less surprising that the proscriptions against undue subsidies have found force in rather confined circumstances. Indeed, despite the Court's articulation of dual proscriptions, a constitutional violation has always involved direct support for specifically religious activity.<sup>74</sup> The cases in this group that find a constitutional violation share three traits:

- (1) A subsidy;
- (2) which directly underwrites specifically religious activity;<sup>75</sup> and

("Nothing in the record indicates that Shared Time instructors have attempted to proselytize their students . . . [or] that the perceived or actual effect of the Shared Time program will be to inculcate religion at public expense . . . . [However,] the [Community Education] program has the perceived and actual effect of advancing the religious aims of the church-related schools."); *id.* at 401 (Rehnquist, J., dissenting) ("Not one instance of attempted religious inculcation exists in the records of the school-aid cases decided today. . . ."); *Aguilar v. Felton*, 473 U.S. 402, 409 (1985) (majority opinion of Brennan, J.) (Excessive entanglement resulted from attempts to prevent government assistance "from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school.") *id.* at 423-24 (O'Connor, J., dissenting) (apparently accepting that *Ball* identified the relevant constitutional injuries).

71. See *Ball*, 473 U.S. at 393.

72. See *Everson*, 330 U.S. at 17-18.

73. An offering is "a contribution to the support of a church." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983).

74. Michael W. McConnell has described these cases as giving "taxpayers . . . a constitutional right to insist that none of their taxes be used for religious purposes." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 183-85 (1992). He believes that, instead, a taxpayer should have "a right to insist that the government not give tax dollars to religion qua religion, or in a way that favors religion over nonreligion, or one religion over another. But the taxpayer has no right to insist that the government discriminate against religion in the distribution of public funds." *Id.* at 185-86. Professor McConnell's vision is actually very close to the existing state of the law.

75. By religious activity I mean some act that is intrinsically religious. That is, by its nature it "relate[s] to or manifest[s] faithful devotion to an acknowledged ultimate reality or deity." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983).

(3) which can fairly be attributed to a government decision to subsidize the specifically religious activity.<sup>76</sup>

Similarly, the government can defend the programs at issue in ways which attempt to negate the existence of one or more of these elements.

### 1. A subsidy.

The benefit at issue in these cases is "a grant or gift of money," or some other support.<sup>77</sup> In this group of cases, the government acts as benefactor, patron, proprietor, or financier. The benefit to religion in these cases is financial aid. If there is a constitutional transgression, it is in the sustenance of religion. These cases do not involve government as regulator because the purported illicit benefit is not that religion gets to operate under more favorable rules of behavior.<sup>78</sup>

This distinction captures an important point. If a legal standard allows one group to operate under more favorable rules of behavior, that kind of advantage is sensibly addressed by the principles of equality developed in the first group of cases. The notions of subsidy developed here, however, go beyond a prohibition against inequality. These cases disallow certain subsidies even if everyone is subject to the same rules. While the distinction may not always be crystal clear, these cases are not difficult to classify: All

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76. Again, I should make clear that this discussion strives to present a clear picture of constitutional constraints as they have existed throughout the *Lemon* era. It does not intend to enter the ample debate over the extent to which religion ought to be allowed to participate in public programs aimed at secular objectives. See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 208-14 (1992); see also Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989) (The doctrine of unconstitutional conditions requires that religion be allowed to participate equally in government programs.).

77. See *id.*; see also *Texas Monthly*, 489 U.S. at 14 ("Every tax exemption constitutes a subsidy . . .").

78. This is why, for instance, the mere coincidence of religious and secular regulatory interests is constitutionally unobjectionable. For example, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court rejected an Establishment Clause challenge to the Hyde Amendment, which restricts the use of Medicaid funds to pay for abortions. The Court stated that:

[A] statute [does not] violate [ ] the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact law prohibiting larceny.

*Id.* at 319 (citation omitted).

In *Bob Jones Univ. v. United States*, 461 U.S. 574, 577 (1983), the Court upheld an IRS construction of section 501(c)(3) of the Internal Revenue Code that denied tax exempt status to schools that discriminate in admissions on the basis of race. *Id.* The Court dismissed out-of-hand the argument that the denial preferred some religions over others in violation of the Establishment Clause. *Id.* The court found this to be a policy which happens to coincide with the tenets of only some religions. *Id.* at 604 n.30; see also *Bowen v. Kendrick*, 487 U.S. 589, 613 (1988).

plainly involved the government as benefactor, patron, proprietor, or financier, and financial aid or analogous tangible assistance.<sup>79</sup>

2. That directly underwrites specifically religious activity.

Direct aid to specific religious activity has meant two different things. On the one hand, it has meant:

- (i) Benefits flowed to pervasively sectarian religious organizations;  
*and*
- (ii) the benefits either consisted of direct financial aid or were to be used in direct support of religious activities.

On the other hand, if a program serves secular objectives and involves predominantly secular beneficiaries, the Court has upheld financial aid be restricted to a religiously affiliated recipient's secular activities, a significantly less stringent constitutional restraint.

(i) *Program benefits flowed to pervasively sectarian religious organizations.*

When the Court has said "pervasively sectarian" organization, it has almost always meant a religiously affiliated primary or secondary school. The Court has long viewed that, for most such schools, attempts to inculcate religious doctrine permeate their educational and other functions. In other words, religious activity pervades the schools' secular activities.<sup>80</sup>

79. See *infra* notes 106-21, and accompanying text.

80. For instance:

The schools of course vary from one another, but substantial evidence suggests that they share deep religious purposes. For instance, the Parent Handbook of one Catholic school states the goals of Catholic education as "[a] God oriented environment which permeates the total educational program," "[a] Christian atmosphere which guides and encourages participation in the church's commitment to social justice," and "[a] continuous development of knowledge of the Catholic faith, its traditions, teachings and theology." . . . . A policy statement of the Christian schools similarly proclaims that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but *the Word of God must be an all-pervading force in the educational program.*" . . . . These Christian schools require all parents seeking to enroll their children either to subscribe to a particular doctrinal statement. The District Court found that the schools are "pervasively sectarian," and concluded "without hesitation that the purposes of these schools is to advance their particular religions," and that a "substantial portion of their functions are subsumed in the religious mission."

School Dist. v. Ball, 473 U.S. 373, 379 (1985) (citations omitted). The Court agreed with the district court's conclusion because:

At the religious schools here—as at the sectarian schools that have been the subject of our past cases—"the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined."

*Id.* at 384 (citations omitted); see also Meek v. Pittenger, 421 U.S. 349, 366 (1975) ("[C]hurch-related elementary and secondary schools . . . typify . . . religion-pervasive institutions. The very

The impact of these characterizations has been of critical importance because they equate such schools with churches and equate their educational functions with religious functions. Thus, by definition, aid to such schools is aid to a church, and support for pedagogy is support for religious indoctrination.<sup>81</sup>

*(ii) The benefits either consisted of direct financial aid, or otherwise might conceivably be used in the direct support of religious activity*

The Court has concluded that religious indoctrination permeates the educational activities of religiously affiliated primary and secondary schools. To channel aid solely to the secular functions of sectarian schools is therefore an exacting task. Small differences in the form of aid have meant unconstitutional support for proselytizing in one case but not the next. Thus, to determine where the constitutional boundaries have been set, one must examine the programs at issue. Because the form of aid can be outcome determinative, the cases are grouped on that basis.

*(a) Tuition grants and tax deductions*

In *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>82</sup> the Court invalidated provisions of a New York law that created grants and

purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.”). *But see* Bowen v. Kendrick, 487 U.S. 589, 631-32 (1988) (Blackmun, J., dissenting) (pervasively sectarian institution means more than just parochial schools).

81. Much of this section argues that, outside the context of aid to religiously affiliated primary and secondary schools, the constitutional proscription against religious subsidies has had little impact. Moreover, this section argues that, despite the often-criticized distinctions between permissible and impermissible aid in the church school cases, the doctrine is quite coherent, if one accepts the Court's conclusions that parochial schools are indistinguishable from churches and religious education and proselytizing are inseparable. *See* John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61 (by reference to Title IX, establishment clause restrictions on aid to parochial schools is essentially cogent). Nor is this to say that an unavoidable subsidy to parochial education cannot be justified by reference to some countervailing policy. *See infra* part II E. *See also* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

For academic literature on church school funding, see, e.g., Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); Jesse H. Choper, *The Establishment Clause and Aid to the Parochial Schools*, 56 CAL. L. REV. 260 (1968) (Aid to parochial schools is constitutional unless there is “a purpose to aid religion” and an “effect that meaningfully endangers religious liberty.” The second prong is not satisfied if the value of secular education services exceeds the amount of the aid.); Eric J. Segall, *Parochial School Aid Revisited: The Lemon Test, The Endorsement Test, and Religious Liberty*, 28 SAN DIEGO L. REV. 263 (1991) (arguing that under a “religious liberty” standard “religiously neutral” parochial school aid programs do not violate the establishment clause).

82. 413 U.S. 756 (1973).

income tax deductions to help offset sectarian school tuition.<sup>83</sup> Clearly, unrestricted payments directly to the school would be unconstitutional because they could be used for sectarian purposes. The Court concluded that “[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear . . . that direct aid in whatever form is invalid.”<sup>84</sup> To channel money through a tax deduction limited to parents of sectarian school children does not make a difference.<sup>85</sup> The same day *Nyquist* was decided, the Court invalidated a Pennsylvania law that provided funds to reimburse parents of a portion of private school tuition.<sup>86</sup>

*(b) Restricted grants*

In *Nyquist*,<sup>87</sup> the Court also invalidated provisions of a New York law that authorized grants to sectarian schools for the “maintenance and repair of school facilities and equipment.”<sup>88</sup> Because the maintenance and repair payments were not, and could not be, restricted to facilities “used exclusively for secular purposes,”<sup>89</sup> these payments impermissibly “subsidize[d] directly the religious activities of sectarian elementary and secondary schools.”<sup>90</sup>

Similarly, in *Levitt v. Committee for Public Education & Religious Liberty*,<sup>91</sup> the Court invalidated a New York law under which sectarian schools were given lump sum payments to defray the costs of student examinations required by law, including both state prepared and teacher prepared tests.<sup>92</sup> The state could not assure that teacher prepared tests were not being used for religious indoctrination and could not allocate costs between secular and nonsecular uses.<sup>93</sup> As a result, the Court struck down the entire payment to sectarian schools.<sup>94</sup>

83. *Id.* at 764-67.

84. *Id.* at 780.

85. *Id.* at 781-88, 790-91; see also *Sloan v. Lemon*, 413 U.S. 825, 828 (1970).

86. *Id.* Parents received \$75 for each student in elementary school and \$150 for each in secondary school up to the amount of tuition paid. *Id.*

87. 413 U.S. 756 (1973).

88. *Id.* at 762. The grants went to schools serving a high concentration of students from low income families and were made on a per-student basis. *Id.* at 763.

89. *Id.* at 774.

90. *Id.*

91. 413 U.S. 472 (1973).

92. *Id.* at 480. Specifically, the state reimbursed the expenses incurred by private schools to administer, grade, compile, and report test results. *Id.* at 474.

93. *Id.* at 477.

94. *Id.* at 482.

However, in *Committee for Public Education & Religious Liberty v. Regan*,<sup>95</sup> the Court upheld a successor New York law designed to cure the infirmities identified in *Levitt*. The new law eliminated reimbursement for teacher prepared tests and audited payments to ensure that only actual costs of secular services were reimbursed.<sup>96</sup>

(c) *In-kind support*

In-kind support has engendered the finest, and least defensible, distinctions. In each case, the Court has examined the assistance to decide whether it entails an unacceptable risk of use during an indoctrinating moment. Given the Court's view that religious indoctrination permeates the activities of parochial schools, it has proven difficult to channel aid solely to secular activities. These types of aid have been invalidated:

- (1) Counseling by public school employees in sectarian schools;<sup>97</sup>
- (2) remedial and accelerated instruction by public school employees in sectarian schools;<sup>98</sup>
- (3) loan of instructional materials and equipment;<sup>99</sup>
- (4) field trip transportation and services similar to those provided to public school students;<sup>100</sup>
- (5) supplemental classes taught by public school teachers in sectarian schools during the school day;<sup>101</sup> and

95. 444 U.S. 646, 657 (1980).

96. *Id.* at 652; see also *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (invalidating a New York law under which reimbursement would be made for such services rendered between the passage of the law at issue in *Levitt* and declared it unconstitutional).

97. *Meek v. Pittenger*, 421 U.S. 349, 353 (1975).

98. *Id.* at 367-72.

99. *Id.* at 354-55. Instructional materials included maps, charts, sound recordings, films, periodicals, photographs, and so forth. *Id.* at 355. The loan was in-kind because:

[Given] the substantial amounts of direct support authorized by [the statute], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [the loan of instructional materials] as channeling aid to the secular without providing direct aid to the sectarian. Even 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. . . .

.....

Substantial aid to the education function of [these pervasively sectarian] schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.

*Id.* at 365-66 (citations omitted); see also *Wolman v. Walter*, 433 U.S. 229 (1977).

100. *Wolman*, 433 U.S. at 252-55.

101. *Ball*, 473 U.S. at 376-79. This "Shared Time" program attempted to supplement the curriculum in nonpublic schools with classes taught during the regular school day by full-time public school teachers. *Id.* The classes were held in space leased from the nonpublic schools and

(6) supplemental classes taught by sectarian school teachers after school.<sup>102</sup>

In the Court's words, invalid programs offer the "kind of direct aid to the educational function of the religious school [that] is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause."<sup>103</sup>

However, several types of in-kind aid have been upheld:

(1) Textbook loans;<sup>104</sup>

(2) standardized test and scoring services, as used in public schools;<sup>105</sup>

(3) speech and hearing diagnosis and treatment, and psychological diagnosis, by public employees on the premises of sectarian schools;<sup>106</sup> and

(4) therapeutic, guidance, and remedial services by public employees, but only in public schools, public centers, or mobile units located off sectarian school grounds.<sup>107</sup>

stripped of religious imagery, and used materials provided by the public schools. *Id.* The average nonpublic school student spent 10% of a school day in a Shared Time class. *Id.* at 375.

102. *Id.* at 376-79. These "Community Education" classes were held after school and were almost always taught by a full-time teacher from that school paid by the public schools to teach a community education course. *Id.*

The Court found that both the Shared Time and Community Education programs presented an unacceptable risk that government paid teachers might intersperse their secular subjects with the religious doctrine of the non-public schools in which they taught. *Id.* at 387-88. The Court stated that:

[T]here is a substantial risk that, overtly or subtly, the religious message [the Community Education instructors] are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. [The Shared Time teachers] may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect. . . . [Thus] there is a "substantial risk" that programs operating in this environment would "be used for religious education purposes."

*Id.* at 387-88 (citations omitted).

103. *Id.* at 395. In other words, "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Id.* at 397; see also *Nyquist*, 413 U.S. at 777.

104. See *Wolman*, 433 U.S. at 233; *Meek*, 421 U.S. at 359-62; *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

105. *Wolman*, 433 U.S. at 233.

106. *Id.* at 241-44.

107. *Id.* at 244-48.

(iii) *Benefits to religious organizations not pervasively sectarian must be restricted to secular activities*

The constitutional restriction at work in these cases reads like those articulated in the sectarian school decisions: Government may not provide a direct subsidy to a specifically religious activity. Instead, aid must be restricted to a religiously affiliated recipient's secular activities. However, here the organizations have not been characterized as pervasively sectarian. Given this, the constitutional standard has been far easier to satisfy. In practice, the Court has upheld substantial financial subsidies to religious organizations when accompanied by restrictions against religious use.

In *Tilton v. Richardson*,<sup>108</sup> the Court upheld aid to church-affiliated colleges and universities under Title I of the Higher Education and Facilities Act of 1963. Title I provided construction funds "for buildings and facilities used exclusively for secular educational purposes."<sup>109</sup> The plurality found no basis in the record to conclude "that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable."<sup>110</sup> The Court struck down, however, that portion of Title I that allowed its religious use prohibition to lapse after twenty years. The Court concluded that "[t]he restrictive obligations of a recipient institution [not to use the facility for sectarian instruction or worship] cannot, compatibly with the Religion Clauses, expire while the building has substantial value."<sup>111</sup> Similarly, in *Hunt v. McNair*,<sup>112</sup> the Court upheld a South Carolina statute under which a state-created authority would issue revenue bonds to finance projects by colleges and universities, including church-affiliated ones.<sup>113</sup> The statute forbade financing for "any facility used or to be used for sectarian instruction or as a place of religious worship. . . ."<sup>114</sup> These use restrictions, and the fact that the religiously-affiliated institutions involved in the case were not pervasively sectarian, avoided any unconstitutional effect.<sup>115</sup>

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108. 403 U.S. 672 (1971).

109. *Id.* at 674-75.

110. *Id.* at 680. "There is no evidence that religion seeps into the use of any of the [ ] facilities . . ." funded under Title I. *Id.* at 681.

111. *Id.* at 683. The Court has since characterized this holding as simply negating a suggestion that constitutional restrictions can expire, not as requiring that statutes contain express restrictions. *Bowen*, 487 U.S. at 614.

112. 413 U.S. 734 (1973).

113. *Id.* at 738.

114. *Id.* at 736.

115. *Id.* at 744-45.

In *Roemer v. Board of Public Works*,<sup>116</sup> the challenged Maryland statutory program offered general grants to private colleges, including religiously affiliated institutions. For each full-time student at a private college, the grants equaled fifteen percent of the money the state spent per pupil in the state college system. The program forbade money for “sectarian purposes,” and did not extend to institutions which primarily awarded seminary or theological degrees.<sup>117</sup> The plurality accepted the district court’s finding that the church-affiliated colleges involved in the case were not “pervasively sectarian” and therefore were not forbidden categorically from receiving state aid.<sup>118</sup> The statutory prohibition against use of the funds for sectarian purposes was therefore a sufficient constitutional guard.<sup>119</sup>

3. The subsidy can fairly be attributed to a government decision to subsidize the specifically religious activity

The paradigmatic constitutional violation occurs when government places a check into a church offering plate. But just because a check ends up in the plate does not mean the government put it there:

[T]he Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.<sup>120</sup>

In such an instance, the offering cannot be fairly attributed to the government. As suggested by this example, intervening third-party action can be of decisive importance.

In at least two circumstances, however, government can fairly be said to have made a choice to subsidize the religious activity:

- (i) When the program itself was directed to support the religious activities of religious groups; or
- (ii) when government failed to employ restrictions to avoid direct support of religious activity, *at least to the extent consistent with the program’s ends.*

The following sections examine the subsidy cases in light of these concepts of fair attribution.

116. 426 U.S. 736 (1976).

117. *Id.* at 740-42 and n.3.

118. *Id.* at 758.

119. *Id.* at 760-61.

120. *Whitters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 486-87 (1986).

(i) *The program itself was directed to subsidize the religious activities of religious groups*

Recall that the Court in the past has characterized religiously affiliated primary and secondary schools as "pervasively sectarian" religious organizations. As such, attempts to inculcate religious doctrine permeate their educational and other functions. Thus, these schools are the legal equivalent of churches, and their educational functions are inseparably joined with proselytizing. Thus, by definition, aid to such schools is aid to a church, and support for pedagogy is support for religious indoctrination.<sup>121</sup> *Moreover, in every instance that the Court has invalidated a program, a gigantic percentage of program benefits was received by sectarian secondary schools.*<sup>122</sup>

Based on the foregoing, programs designed chiefly to benefit church schools can be seen as government assistance targeted at the religious activities of religious organizations which, as an incidental matter, might benefit their secular activities and secular groups. Viewed this way, there is no question that the subsidy can be fairly attributed to government. If one accepts the fact that religious indoctrination is inseparable from the educational functions of church schools, a program that mainly benefits church schools raises a strong inference that government sought to subsidize religious activity.

(ii) *Government failed to employ restrictions to avoid direct subsidy of religious activity, at least to the extent consistent with the program's ends*

The starting premise is that government may not direct a subsidy to religious activity or, in other words, the government may not make a donation to a church. When a program is defended as providing aid in pursuit of a secular goal, the question of fair attribution can become complicated. Still, some fair attribution issues are clear and uncomplicated. For instance, to choose religious means to effect a secular objective when secular alternatives are available would make any religious subsidy fairly attributable to

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121. See *supra* notes 82-83 and accompanying text.

122. See *supra* notes 84-104 and accompanying text. In *Ball*, 473 U.S. at 379, 40 of 41 recipients of program benefits were sectarian schools; in *Wolman v. Walter*, 433 U.S. 229, 234 (1974), 691 of 720 were sectarian schools; in *Meek*, 421 U.S. at 364, 75% were church-related schools; in *Sloan v. Lemon*, 413 U.S. 825, 830 (1973), over 90% were church-run schools; and in *Nyquist*, 413 U.S. at 768 n.23, 1748 of 2038 beneficiaries were religiously affiliated primary and secondary schools.

the government.<sup>123</sup> To choose religious over secular means evinces a decision to embrace the peculiarly religious aspects inherent in the means. In other words, it evinces a decision to support the activity *because of* its peculiarly religious features.

In the same vein, a program aimed at secular objectives might guard against direct support of religious activity. If it does, it might thereby nullify a conclusion that an incidental religious subsidy could be fairly attributable to government.<sup>124</sup> At the least, *avoidable* subsidies can fairly be attributed to the government.<sup>125</sup>

Attribution may not be fair in two key circumstances. One, if the principal objectives of the program would be frustrated by restrictions that sought to avoid the provision of program benefits to religious activity. Two, if some benefits under a broad program happened also to fall to pervasively sectarian organizations. In either circumstance, the subsidy might be said to be an unavoidable consequence of the program. Unavoidable, that is, unless government singles out religious recipients for exclusion.

Stated another way, government sometimes might decide to go forward with a program notwithstanding the prospect that religious activity would thereby receive a subsidy. In some cases government can be said act *in spite of* the subsidy it will give to religion. Then the question would remain whether such subsidy are nevertheless unconstitutional.<sup>126</sup>

### (iii) *Intervening choices of third-parties*

Sometimes, the decision to confer a benefit on a religious organization can be attributed to a third party and not the government. Two subsidy cases were decided on the basis that third party involvement served to forestall constitutional difficulty. In *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>127</sup> the Court found no difference between direct

123. See *County of Allegheny v. ACLU*, 492 U.S. 573, 618 (1989) (Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith.)

124. The cases which involved aid to religious higher education serve to illustrate. Consider *Tilton v. Richardson*, 403 U.S. 672 (1971), see *supra* notes 110-113 and accompanying text, and Title I's religious use restriction. Consider also *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); see *supra* notes 118-121 and accompanying text, and its state-law requirement that aid recipients use funds only for secular purposes. In neither case were program goals compromised by government's efforts to avoid giving a subsidy to religious activity. *Roemer*, 426 U.S. at 754; *Tilton*, 403 U.S. at 678. In both cases the programs sought to support private higher education.

125. See *Bowen v. Kendrick*, 487 U.S. 589, 641 (1988) (Brennan, J., dissenting) (Government cannot employ "religion *because of* its unique appeal to a higher authority.")

126. See *infra* notes 275-82 and accompanying text.

127. 413 U.S. 756 (1973).

payments to sectarian schools and grants and tax deductions afforded parents of sectarian school children.<sup>128</sup> By contrast, in *Mueller v. Allen*,<sup>129</sup> the Court upheld a Minnesota tax deduction for expenses incurred for elementary and secondary school tuition, texts, and transportation. The Court found these factors negated a constitutional violation: It was one of many available tax deductions; the deduction was available for educational expenses incurred by all parents, including those whose children attended public schools; and sectarian schools benefitted from the deduction only as a result of individual, private choices. *Nyquist* was distinguished because the deduction was based on expenses and applied to all schools, public and parochial.<sup>130</sup> In short, the Constitution allowed the "attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flow[ed] to parochial schools from the neutrally available tax benefit."<sup>131</sup>

Most recently, in *Witters v. Washington Department of Services for the Blind*,<sup>132</sup> the Court unanimously upheld a Washington state program providing aid to blind students, under which Witters applied to receive vocational rehabilitation aid. The aid would ultimately go to a private Christian college where Witters was studying for a career in religious service.<sup>133</sup> The majority found that the aid could not be attributed to the government. Aid

128. *Id.* at 783-87, 790-91; see also *Sloan v. Lemon*, 413 U.S. 825, 828 (1973) (tuition reimbursement plan).

129. 463 U.S. 388 (1983).

130. *Id.* at 398-99.

131. *Id.* at 400. The four dissenters found *Nyquist* controlling and identified these constitutional injuries:

There can be little doubt that the State of Minnesota intended to provide, and has provided, "[s]ubstantial aid to the educational function of [church-related] schools," and that the tax deduction for tuition and other education expenses "necessarily results in aid to the sectarian school enterprise as a whole. . . ."

[F]or the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction.

*Id.* at 416-17 (Marshall, J., dissenting). Putting aside whether it ought to negate a constitutional violation, I think the idea of fair attribution explains the difference between these two decisions better than alternative theories. Professor Lupu has identified two competing explanations. First, benefits to religious institutions create an inference of nonsecular purpose, while benefits to individuals do not. I find it far likelier that government's purpose in either case is to benefit religious education. Second, and the explanation that Professor Lupu prefers, is that aid to individuals—rather than institutions—prevents capture of resources by more entrenched religious groups. See Lupu, *Keeping the Faith*, *supra* note 18, at 752-53. However, I see little economic difference between a group which forms a school and applies for aid, and a group which forms a school and whose members then receive a tax deduction at year's end.

132. 474 U.S. 481 (1986).

133. *Id.* at 483.

is paid directly to the student, and the decision to use their aid for religious education is truly the result of private choice.<sup>134</sup>

Washington's program is . . . in no way skewed toward religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this court[.]" . . . It creates no financial incentive for students to undertake sectarian education . . . . In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.<sup>135</sup>

### C. *Government Speech with a Religious Message: The Restraining Principles of Endorsement*

Assume that a city has these words printed on the top of each page of city correspondence: "Offer up your devotions to God your Creator, and his Son Jesus Christ, the Redeemer of the world!"<sup>136</sup> Assume further that to do so raises a constitutional issue, even if the message costs the city nothing, and even if it is constitutional for coins to read "In God We Trust." Resolution of the question would turn on the extent to which government may engage in religious speech.

The cases in this group impose limits on religious exhortations attributable to government. They share three salient traits:

- (1) The activity in question was in its essence expressive;
- (2) government gave its approval to the specific message sent by the expressive activity; and
- (3) a reasonable observer would receive a message from government that religion or a particular religious belief is favored or preferred.<sup>137</sup>

The first element is of importance because the constitutional restraints imposed by these cases can be sensibly understood if they are seen as limits on expression and not as the application of a general constitutional standard in the specific context of expressive activity. The second element is likewise

134. *Id.* at 487.

135. *Id.* at 487-88 (footnotes and citations omitted).

136. *See County of Allegheny v. ACLU*, 492 U.S. 573, 607 (1989).

137. This is the essence of Justice O'Connor's endorsement test, which obviously underlies the constitutional proscription outlined in this section. Whether this is the meaning of endorsement in all contexts, the cases to evaluate religious speech have used endorsement to mean favoritism or preference.

critical. The limits are on *government* expression.<sup>138</sup> The second element therefore requires that government can fairly be said to have given its support to the particular message. The third element resides at the center of the constitutional problem: whether the message, in its context, was objectionably religious. Although phrased in broad terms, the third element has consistently turned on four factors: the force of the religious message; the extent to which government was identified with the message; the audience to whom it was directed; and other, contextual factors, such as history.<sup>139</sup>

The cases in this group conclude that the Establishment Clause, at least in some circumstances, forbids government from espousing a religious message and that there are constitutional limits on government's ability to make a religious statement. If this is so, when government sends or selectively facilitates a particular message that has a religious component, it is entirely appropriate to focus on the message. Indeed, passing the message, under nearly any standard, is unavoidable. For instance to determine whether government has sent any religious message is not a question different in kind from determining whether government has sent an objectionably strong one. The placement on the spectrum is merely different.<sup>140</sup> Thus, the court cannot avoid evaluating, case by case, the religious content of

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138. See generally Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 875-76 (1979).

For scholarly treatment of Justice O'Connor's endorsement approach, see, e.g., Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Joseph Richard Hurt, *The Use of Endorsement in Establishment Clause Analysis: The Key to a New Consensus*, 8 MISS. COLL. L. REV. 1 (1987); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1071 (1986); William P. Marshall, *"We Know It When We See It: The Supreme Court and Establishment"*, 59 CAL. L. REV. 495 (1986); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). Except for Steven Smith's article, all these commentators argue for an expansion of Justice O'Connor's endorsement inquiry into a broader, generally applicable standard, a position with which I strongly disagree.

139. Once again, I wish to note that his discussion should not be construed to suggest that I find this approach optimal. Nor, for that matter, should it be construed to suggest that I find it unacceptable. Rather, my point is that the Court's approach, properly confined, is essentially cogent. *Contra* Smith, *supra* note 138.

140. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 6-9 (1986) ("[T]he Establishment Clause absolutely disables the government from taking a position for or against religion. . . . [Thus] government should not put 'In God We Trust' on coins. . . ."). However, this approach is complicated by the fact that to root out a mild religious message which has been in place for a very long time may send an anti-religious message. See Conkle, *supra* note 13.

government speech, absent a rule that government is free to send any message it likes.<sup>141</sup>

1. The activity in question was in its essence expressive

This element highlights that limits in this context area are limits on speech.<sup>142</sup> Whatever definitional difficulties might be anticipated, the cases have raised almost no problems. Two cases involved audible public group prayer.<sup>143</sup> Two of the other five concerned holiday displays which included religious symbols.<sup>144</sup> Axiomatically, audible public group prayer is speech. Likewise, symbolic displays, by definition, are communicative activity. The final case involved display of religious text.<sup>145</sup> Again, the essentially expressive quality is easy to see. To post the Ten Commandments in a school is an activity that is fundamentally communicative.<sup>146</sup>

2. Government gave its approval to the specific message sent by the expressive activity

Specific government approval has meant one of two things:

- (i) Government sent the message; or
- (ii) government selectively facilitated the message, such as where government was responsible for the speaker's access to the audience.

Most plainly, government signals its specific approval of a message if its officers, agents, or employees, acting on behalf of the government, choose to send a particular message themselves. Government may also demonstrate its approval when it facilitates selectively the messages of others; for instance, when government can afford a speaker special access to an audience. Whenever government selectively lends its voice or resources to a particular activity, government expresses its approval and has made a choice in favor of that activity.<sup>147</sup>

141. Once again, I wish to note that this discussion should not be construed to suggest that I find this approach optimal. Nor, for that matter, should it be construed to suggest that I find it unacceptable. Rather, my point is that the Court's approach, properly confined, is essentially cogent. *Contra* Smith, *supra* note 138.

142. For these purposes only, an act of religious worship or celebration is essentially expressive.

143. *See* Lee v. Weisman, 112 S. Ct. at 2649 (1992); Marsh v. Chambers, 463 U.S. 783 (1983).

144. *County of Allegheny*, 492 U.S. at 573; Lynch v. Donnelly, 465 U.S. 668 (1984).

145. *Stone v. Graham*, 449 U.S. 39 (1980).

146. The essentially expressive nature of the activities at issue can also be seen in the purported secular purposes and effects offered when the activities were challenged. Typical attempts include the assertion that government was merely trying to accommodate a religious group or acknowledge the religious practices of some of its citizens. *See* Lynch at 681.

147. Government does not selectively accommodate or selectively and kindly acknowledge activities it does not wish to encourage. The reason a city neither constructs an annual display to

Focusing on the first element, the cases have raised no definitional problems. Twice government chose the speaker for a government-sponsored event and helped to craft the message.<sup>148</sup> Three times government participated in the erection of a holiday display, two of which were on government property<sup>149</sup> and one that was not.<sup>150</sup> Once, government posted religious text in public school classrooms.<sup>151</sup>

Thus, in all the cases in this group, government has clearly made a specific decision to send or back the message at issue.<sup>152</sup> The issue has not been whether the message is one that government *did* choose to support. Rather, the issue has been whether the message is one that government *may* choose to support. More precisely, the determinative issue, addressed by element three, has been whether the message communicated the thought that government favored religion or a particular religious belief.

### 3. A reasonable observer would receive the message that government endorsed religion

It is this element that establishes the constitutional boundaries. Sometimes the Court has found a government-supported message that has a religious component consistent with the Constitution. Sometimes it has not. Predictably, differentiating objectionable messages from unobjectionable ones has engendered the most controversy. It is over this element that the Court has fractured.<sup>153</sup>

Four factors nevertheless emerge as controlling. The first is the strength and clarity of the religious message. Marked, narrowly sectarian messages stand on one extreme and mild, denominationally generous messages on the other. The second factor is the extent to which government is perceived to

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celebrate fornication nor allows private citizens to do so on the steps of the capitol is not because such a display would fail to coincide with the "beliefs and practices of many of its citizens." *See Lee*, 112 S. Ct. at 2655.

148. *Lee*, 112 S. Ct. at 2649 (Government chose a religious speaker to give an invocation at public school graduation ceremonies under government prepared guidelines as to the form of the prayers). *Marsh v. Chambers*, 463 U.S. 783 (1983) (Government employed a legislative chaplain who opened each legislative session with prayer, again under government guidelines as to the form of prayer.).

149. *County of Allegheny*, 492 U.S. at 573 (1989) (evaluating two holiday displays).

150. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

151. *Stone v. Graham*, 449 U.S. 39 (1980).

152. Government cannot be said to give its approval to all specific messages expressed in a public forum. *See infra* notes 258-81 and accompanying text (discussing access to a public forum for religious speaker). *See also Widmar v. Vincent*, 454 U.S. 263 (1981).

153. At present, Chief Justice Rehnquist and Justices Scalia and Thomas, appear ready to remove all, or nearly all, limits on religious speech by government. *See Lee*, 112 S. Ct. at 2684 (Scalia, J., dissenting) (suggesting that speech alone could never violate the Establishment Clause).

stand behind the statement. A third inquiry centers on the identity of the audience and the extent to which the audience is obliged to listen. Finally, other, contextual factors, such as history, can provide mitigating influences.<sup>154</sup>

In broad view, the Court has exercised notable vigilance against messages that school children must hear, or worse, must participate in expressing.<sup>155</sup> Change the audience to state legislators, add mitigating historical perspectives, and even a strong message can pass review, at least if it is not narrowly sectarian.<sup>156</sup> A mild Christian message directed to the public for a short period at Christmas may pass constitutional scrutiny,<sup>157</sup> while a stronger message with government more clearly behind it might not.<sup>158</sup>

The following discussion seeks to demonstrate that the opinions can be understood as attempts to demarcate the permissible level of religious expression by government. The point is not that the cases yield consistent answers, but that the answers given are all directed at this question.<sup>159</sup>

### (i) Prayer

The Court's most recent Establishment Clause decision was also its latest attempt to set limits on religious expression by government. In *Lee v. Weisman*,<sup>160</sup> the Court invalidated the practice in Providence, Rhode Island, of including invocation and benediction prayers in public middle and high school graduation ceremonies. The Court found:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity

154. *E.g.*, *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring) ("[T]he 'history and ubiquity' of a practice is relevant . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."); *Lee*, 112 S. Ct. at 2679-81 (Scalia, J., dissenting) (placing emphasis on historical perspective).

155. *Lee*, 112 S. Ct. at 2649; *Stone*, 449 U.S. at 39.

156. *Marsh*, 463 U.S. at 783.

157. *Lynch*, 465 U.S. at 668.

158. *County of Allegheny*, 492 U.S. at 573.

159. *See id.*, at 629 (O'Connor, J., concurring) ("To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yields results with unanimous agreement at the margins.")

160. 112 S. Ct. 2649 (1992).

are in fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.<sup>161</sup>

Government decided that the religious exercise would occur; chose the religious participant; directed and controlled the content of the prayer; and created "subtle coercive pressures" to participate or appear to participate.<sup>162</sup> In short, government support for a clear religious message directed to a captive audience which included school children transgressed the Constitution's minimum guarantee: "Government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>163</sup>

In a concurring opinion, Justice Souter placed emphasis on the same factors. In his view, the essence of the issue was where this activity fell on the spectrum of religious speech by government:

[The government argues] that graduation prayers are no different from presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families.<sup>164</sup>

The other post-*Lemon* case to involve government-sponsored, public prayer was *Marsh v. Chambers*.<sup>165</sup> The Nebraska Legislature opened each session with a prayer offered by its chaplain. The chaplain earned \$319.75 each month that the legislature was in session. Although chosen biennially, the same Presbyterian minister had served for eighteen years.<sup>166</sup> The Court found this practice consistent with the Constitution.

Notably, the Court focused on the four usually decisive factors. The Court examined the potency of the religious message, the extent to which government is perceived to stand behind it, and the audience to whom it was directed, and the historical context—a factor of decisive importance in this case.<sup>167</sup> The Court stated:

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161. *Id.* at 2655.

162. *Id.* at 2656.

163. *Id.* at 2655 (citation omitted); see also *id.* at 2664 (Blackmun, J., concurring) (Prayer is impermissible because government may not endorse or promote religion, or engage in religious practice.).

164. *Id.* at 2678 (Souter, J., concurring).

165. 463 U.S. 783 (1983).

166. *Id.* at 784-85.

167. This is notable because *Marsh* was the first post-*Lemon* case not to inquire into purpose, effect, and entanglement, and because *Marsh* predated Justice O'Connor's endorsement approach.

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.

....

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.<sup>168</sup>

This historical perspective was the context in which Nebraska's practice must be evaluated:

[T]he delegates [to the constitutional convention] did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view." . . . . Rather, the Founding Fathers looked at invocations as "conduct whose effect harmonized with the tenets of some or all religions." . . . . Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination."<sup>169</sup>

Moreover, "there [wa]s no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."<sup>170</sup> Rather the prayers were nonsectarian, although in the Judeo-Christian tradition, "with 'elements of the American civil religion.'"<sup>171</sup>

### (ii) Seasonal display of religious symbols

The two cases reviewing public, seasonal displays containing religious symbols illustrate increased concentration on the message sent by the display and government's role in sending it. The first case, *Lynch v. Donnelly*,<sup>172</sup> evaluated a city-sponsored Christmas scene:

Each year . . . the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and is located in the heart of the shopping district. . . . The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa

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168. *Id.* at 786, 790.

169. *Id.* at 792 (citations omitted).

170. *Id.* at 794-95.

171. *Id.* at 793 n.14. In dissent, Justice Brennan focused on the same factors. *Id.* at 798 (Brennan, J., dissenting).

172. 465 U.S. 668 (1984).

Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and [a city-owned] creche. . . .<sup>173</sup>

The majority concluded that to include the creche in the display did not have the effect of advancing religion prohibited by the second prong of *Lemon*. The Court surveyed the cases and found that greater benefits have been tolerated.<sup>174</sup>

Concurring, Justice O'Connor first articulated her now well-known endorsement approach. Introduced as a refinement of *Lemon*, the inquiry is whether government's actual purpose was to endorse religion or, regardless of purpose, whether that is the effect of the activity.<sup>175</sup> This approach turns on the message communicated:

Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>176</sup>

. . . .

What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.<sup>177</sup>

Focusing on the entire display, not just the creche, Justice O'Connor concluded that the city's purpose was to celebrate a public holiday.<sup>178</sup> Moreover, the display, as a whole and in its seasonal context, could not be "understood to endorse the religious content of the holiday."<sup>179</sup> Rather,

173. *Id.* at 671.

174. *Id.* at 681-83. The basis of this comparison is difficult to discern. See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 783.

175. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

176. *Id.* at 688.

177. *Id.* at 692.

178. *Id.* at 691. (O'Connor, J., concurring). The majority opinion also focused on the entire display. To "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation. . . ." *Id.* at 680. In contrast, the dissent focused on inclusion of the creche. "The primary effect' of including a nativity scene in the city's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." *Id.* at 701 (Brennan, J., dissenting).

179. *Id.* at 692. (O'Connor, J., concurring) It is the context, in Justice O'Connor's view, that explains why museum display of religious art fails to send a message that government endorses religion. *Id.* at 692. Context explains other cases:

government simply celebrated a common holiday, which has strong secular components, with traditional holiday symbols.<sup>180</sup>

By the time the Court decided the next holiday-display case five years later, the entire Court focused sharply on the message sent by the activity under review. Under consideration in *County of Allegheny*<sup>181</sup> were two displays. One was a creche constructed on the main staircase of the Allegheny County Courthouse; the other included a menorah outside the city-county building. The Court described the creche display in these terms:

The county courthouse is . . . [the] seat of government. . . . The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase. . . .

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a creche in the county courthouse during the Christmas holiday season. . . .

The creche in the county courthouse, like other creches, is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew. The creche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"

During the 1986-87 holiday season, the creche was on display on the Grand Staircase from November 26 to January 9. . . . It had a wooden fence on three sides and bore a plaque stating: "This Dis-

[Government] "acknowledgments" of religion [such] as . . . declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

*Id.* at 692; (O'Connor, J., concurring); see also *County of Allegheny*, 492 U.S. at 595 n.46 (plurality opinion of Blackmun, J.).

180. *Lynch*, 465 U.S. at 693. (O'Connor, J., concurring). The four justices in dissent also focused on "whether Pawtucket [ran] afoul of the Establishment Clause by endorsing religion through its display of the creche." *Id.* at 697-98 n.3 (Brennan, J., dissenting). They concluded that:

Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the city's creche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.

*Id.* at 695 (Brennan, J., dissenting).

181. 492 U.S. 573 (1989).

play Donated by the Holy Name Society." Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. . . . The county also placed a small ever-green tree, decorated with a red bow, behind each of the two endposts of the fence. . . . These trees stood alongside the manger backdrop and were slightly shorter than it was. The angel thus was at the apex of the creche display. Altogether, the [display] occupied a substantial amount of space on the Grand Staircase. No figures of Santa Claus or other decorations appeared on the Grand Staircase.<sup>182</sup>

The City-County Building is separate and a block removed from the County Courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County . . . .

For a number of years, the city has had a large Christmas tree under the middle arch outside the [arched and columned] Grant Street entrance. Following this practice, city employees on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. . . . A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah. . . .<sup>183</sup>

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance . . . an 18-foot Chanukah menorah. . . .<sup>184</sup>

Justice Blackmun, with Justices Brennan, Marshall, Stevens, and O'Connor, concluded that the creche conveyed an objectionable message.<sup>185</sup> In this setting, the "county sen[t] an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message."<sup>186</sup> Unlike the display in *Lynch*, the creche here sent an unambiguous Christian message:

182. *Id.* at 579-81 (footnotes and citations omitted).

183. *Id.* at 581-82.

184. *Id.* at 587 (footnotes and citations omitted).

185. The majority agreed that "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . ." *Id.* at 593-94.

186. *Id.* at 600. (Kennedy, J., with Rehnquist, C.J., White & Scalia, JJ., concurring in the judgment in part and dissenting in part). Indeed, the majority opinion on this point tracked the elements outlined in this section:

*Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.<sup>187</sup>

The four Justices in dissent on this issue, Justices Kennedy, White, Scalia, and Chief Justice Rehnquist, would require a stronger message before finding a constitutional violation. Mere endorsement of a sectarian message should not be enough. Rather:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a state religion or religious faith, or tends to do so." . . . These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.<sup>188</sup>

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There is no doubt, of course, that the creche itself is capable of communicating a religious message. . . . Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. . . . [T]he creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. . . . No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

*Id.* at 598-600 (footnote omitted and citations omitted).

187. *Id.* at 601; *see also id.* at 626 (O'Connor, J., concurring) (The display endorsed Christianity and conveyed a message that Christians were "favored members of the political community" and nonChristians were outsiders.); *id.* at 652 (Stevens, J., concurring in part and dissenting in part) ("Application of a strong presumption against the public use of religious symbols . . . will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular.") (footnote omitted).

188. *Id.* at 659-60 (Kennedy, J., concurring in part and dissenting in part) (citation omitted). The majority concluded that his approach simply lowered the threshold:

Indeed, perhaps the only real distinction between Justice Kennedy's "proselytization" test and the Court's "endorsement" inquiry is a burden of "unmistakable" clarity that Justice Kennedy apparently would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause. . . . The question whether a particular practice "would place the government's weight behind an obvious effort to proselytize for a particular religion . . . is much the same as whether the practice demonstrates the government's support, promotion, or "endorsement" of the particular creed of a partic-

This approach also embraces a focus on the message. Indeed, Justice Kennedy later noted the importance of the same four factors which typically receive emphasis: the potency of the religious message; the extent to which government can be seen to stand behind it; the audience to whom it is directed; and the existence of mitigating factors, such as historical perspective. The Court stated that:

[C]oercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.<sup>189</sup>

. . . .

In [any case, when] determining whether there exists an establishment, or a tendency toward one, we refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law.<sup>190</sup>

A different majority concluded that the display outside the city-county building sent an acceptable message. Not unsurprisingly, the four Justices who concluded that the creche display was constitutional also approved the city-county display.<sup>191</sup> They were joined by Justices Blackmun and O'Connor who, for somewhat different reasons, found no unconstitutional message. Justice Blackmun concluded that:

The relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems fair more plausible. . . .<sup>192</sup>

In Justice O'Connor's view, however:

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ular sect—except to the extent that it requires an “obvious” allegiance between the government and the sect.

*Id.* at 608 (footnote and citations omitted).

189. *Id.* at 661 (footnote and citations omitted).

190. *Id.* at 662 (Kennedy, J., concurring in part and dissenting in part) (footnote omitted).

191. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

192. *Id.* at 616 (plurality opinion of Blackmun, J.). Justice Blackmun also found it:

“[D]istinctively implausible to view the combined display . . . as endorsing Jewish faith alone. . . . When a city [with a small Jewish population] like Pittsburgh places a symbol of Chanukah next to a symbol of Christmas, the result may be a simultaneous endorsement of

[T]he relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.<sup>193</sup>

. . . .

By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of the year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.<sup>194</sup>

(iii) *Religious doctrine in schools*

In *Stone v. Graham*,<sup>195</sup> the Court, per curiam, struck down a Kentucky statute that required that a copy of the Ten Commandments be posted on the wall of each public classroom.<sup>196</sup> The Court found that the statute lacked a secular purpose and thus fell under the first prong of the *Lemon* test.<sup>197</sup> The factors that negate the existence of a secular purpose are the same issues at the heart of other cases to limit religious speech by government: the strength of the religious message, the audience to whom it is directed, the extent that it has government backing, and any mitigating effects of context. The Court in *Stone* stated that:

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoid-

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Christianity and Judaism . . . [but it] cannot reasonably be understood as an endorsement of Jewish—yet not Christian—belief.”

*Id.* at 616 n.64.

193. *Id.* at 634.

194. *Id.* at 635. In dissent, Justices Brennan, Marshall, and Stevens “thought that the answer as to the first display supplied the answer to the second.” *Id.* at 637 (Brennan, Marshall, & Stevens, JJ., concurring in part and dissenting in part).

195. 449 U.S. 39 (1980).

196. *Id.* at 39-40.

197. *Id.* at 41-43.

ing idolatry, not using the Lord's name in vain, and observing the Sabbath Day . . . .

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. . . . Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. . . .

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State Government . . . ." <sup>198</sup>

#### 4. Endorsement and equality compared

There are three important differences between the equality and the endorsement inquiries. First, departure from the principles of equality have been justified as necessary to protect Free Exercise values. Government could overcome the presumption against religious classifications in order to take some action designed to allow religion to operate more or less unhindered. By contrast, when government endorses a religious message, no barriers to religious practice are removed. One cannot fairly characterize as a barrier a policy not to grant *avored* access to government prestige, any more than it is useful to say that establishment of an official religion removes the burden of lawful religious competition.<sup>199</sup> Simply put, the cases which countenance a religious classification involve attempts to reconcile religious exercise with burdensome interests at work in the world. The endorsement cases present no such conflict.<sup>200</sup>

198. *Id.* at 41-42 (footnote and citation omitted).

199. As Justice O'Connor has said, the task is to:

[S]eparate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. . . . [I]n order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action.

*Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (citation omitted). See also *County of Allegheny*, 492 U.S. at 613 n.59 ("Prohibiting the display of a creche at this location, it bears repeating, does not impose a burden on the practice of Christianity (except to the extent some Christian sect seeks to be an officially approved religion), and therefore permitting the display is not an "accommodation" of religion in the conventional sense.").

200. "The display of a creche in a courthouse does not remove any burden on the free exercise of Christianity. Christians remain free to display creches in their homes and churches." *County of Allegheny*, 492 U.S. at 601 n.51.

Second, principles of equality are clumsy tools with which to evaluate religious speech. For example, when government seeks to facilitate exercise by removing a regulatory or private barrier, it imposes a norm designed to serve that end. That norm seeks to distinguish exempt from non-exempt activity and employs a classification crafted to encompass the religious activity. Accordingly, constitutional doctrine tailored to separate permissible classifications from impermissible ones, like equal protection principles, are well suited to this task. By contrast, constitutional models designed to assess the validity of regulatory classifications are ill suited for use in the endorsement context. When government participates in religious expression, regulatory classifications are simply not at issue. Rather, in the endorsement cases any objectionable inequality stems from a forbidden message. If there is no message of sectarian preference, there is no sectarian preference. If no objectionable message is endorsed, there is no constitutional difficulty. Any benefits and burdens caused by government participation in religious expression flow from identification with the message. Therefore, the constitutional restraints properly focus on the message sent by the government's action.

Third, and conversely, when religious classifications are at issue, the endorsement inquiry adds nothing to the equality inquiry; rather, endorsement is merely parasitic. In the equality cases, an illicit classification delivered an objectionable message of favoritism. If a message of sectarian preference was present it was because government employed an unjustified or ill-crafted sectarian classification. The classification was thus at the root of the constitutional difficulty and therefore was the appropriate focus of the constitutional inquiry.

##### 5. Endorsement and subsidy compared

At its core, the prohibition against endorsement is a limit on government speech, while the prohibition against undue subsidy is a limit on government donations. The essence of endorsement is that government lent its voice to a religious message, or has given a special place to a particular religious message, such as providing preferred access to an audience. In a phrase, endorsement speaks to the status given a religious message. The expenditure of government funds is an incidental matter.

In contrast, the subsidy cases are concerned with distribution of (other) government resources. The constitutional injury stems from support for the

religious business of religious organizations. The expenditure of government funds is at the center of the controversy.<sup>201</sup>

*D. When Government Acts as Referee: Restraining Principles of Church Autonomy*

The First Amendment forbids government review of certain church decisions: Government must accept church answers on various questions as final. Religious organizations retain sovereign authority over particular matters and, therefore, some *substantive* issues are placed outside government control. This constitutional prohibition has given rise to principles of church autonomy<sup>202</sup> that have manifested themselves in two contexts. With regard to the exercise of judicial power, the Constitution renders certain questions nonjusticiable. With regard to executive power, these cases suggest limits on the government's ability to enforce regulatory requirements. Religious organizations are given certain independence to operate their day-to-day affairs, at least in regard to religious matters.<sup>203</sup>

The discussion that follows is organized, not by doctrine, but by the nature of the case. The first group concerns the role of civil courts in resolving intrachurch disputes. In this context, the Court has forbidden judicial resolution of theological and other important internal church matters. Definition of which decisions are church reserved for the Church emerges as a dominant theme in these cases. In the second line of cases, the Court has ruled that restrictions designed to avoid an unconstitutional subsidy to parochial schools can unconstitutionally entangle government in

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201. For a discussion of cases that explore this intersection, see *infra* notes 258-82 and accompanying text.

202. I can think of no better way to describe the idea that the Establishment Clause places certain substantive issues outside the reach of the government. However, the discussion in this section focuses on the competence of government to undertake a task, not on the idea that a church has a "right" of sovereign authority. The Church has autonomy and sovereignty by default.

Commentators are split over whether the Establishment Clause protects church autonomy. See Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1378-88 (1981) (arguing against Establishment Clause protection because "government support for religion is an element of every establishment clause claim"); William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293 (1986) (The Establishment Clause offers no protection.); Carl H. Esbeck, *Establishment Clause Limits on Government Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984) (arguing that the Establishment Clause ought to shield religious organizations from regulation and ought to preclude judicial resolution of intra-church disputes).

203. See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (The constitutional prohibitions serve to prevent government from "entangle[ment] in essentially religious controversies."); *id.* at 718 (The *process* of "detailed review" of church decisions offends the constitution.).

church affairs. Again, the cases suggest that a law might ask questions reserved for churches alone. In addition, the focus in these cases is often on the oversight required by valid regulation. Therefore, a church's sphere of operational independence is also at issue. The intrachurch disputes are presented first because the cases which evaluate regulatory oversight can be better understood once the notion of nonjusticiable religious issues is established.

A third section discusses the cases that have arisen outside these two contexts. Although no government action has been invalidated, the Court has suggested that the principles of autonomy might find application in sufficiently analogous circumstances.

At one level, it is perhaps easiest to see the essentially separable character of the constitutional restraints imposed in these cases. In none of these cases does government employ a religious classification to impose a burden or distribute a benefit.<sup>204</sup> Indeed, the constitutional violations turn in no way on a benefit—financial or otherwise—to the group awarded the constitutional shield; thus, the restrictions on subsidies are inapplicable. And in none of the cases is a government sponsored religious message anything but a derivative matter.

At another level, though, the principles at work here may have the broadest potential application, despite the narrow context to which they are presently confined. In each case to find a constitutional violation, one way to view the Court's ruling is that the Court decided that some question was too religious for government to answer. Yet the application of any legal standard—including constitutional standards—can turn on a religious question. For example, the principles of equality are triggered by a *religious* classification; the endorsement inquiry asks whether government has sent a message that *religion* or a *religious* belief is favored or preferred; the subsidy cases limit government support for specifically *religious* activity; different subsidy rules apply if a pervasively sectarian religious organization is the recipient.<sup>205</sup> At some point, the constitution may disable government from resolving these issues, too.

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204. Except, that is, classifications designed to avoid an Establishment Clause problem. *E.g.*, *Roemer v. Board of Pub. Works*, 426 U.S. 736, *supra* notes 121-24; *Tilton v. Richardson*, 403 U.S. 672, *supra* notes 113-16. *See also infra* part II.D.[2]. Such classifications, naturally, are backed by a sufficient justification. The question ought to remain, however, whether they were closely tailored just to avoid providing an undue subsidy.

205. *See, e.g.*, Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Philip E. Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 CAL. L. REV. 817, 831-39 (1984).

Notably, to the extent that they shield religious groups from government-imposed burdens, the principles developed in these cases parallel protections afforded under the Free Exercise Clause. Indeed, in several cases, the Court rested its decision broadly on "the First Amendment," and not narrowly on the Establishment Clause.<sup>206</sup> The reason is straightforward: "[For] government [to] declare which party is correct in matters of religion, . . . would violate the principles of both religion clauses. A judicial declaration of such matters would simultaneously establish one religious view as correct for the organization while inhibiting the free exercise of the opposing belief."<sup>207</sup>

Historically, the Free Exercise Clause has served to invalidate substantial burdens on both religious beliefs and practices. However, the Court's latest Free Exercise case, *Department of Human Resources v. Smith*,<sup>208</sup> significantly constricted the concept of unconstitutional burden.<sup>209</sup> After *Smith*, the only laws necessarily barred by the Free Exercise Clause are those which regulate "religious *beliefs* as such" or which seek "to ban [religiously motivated] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."<sup>210</sup> *Smith* may therefore call the cases in this group into question, to the extent that they rest on the conclusion that government impermissibly burdened the autonomy of religious organizations.<sup>211</sup> As a consequence, any other grounds on which these decisions rest become important.<sup>212</sup>

206. See *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Serbian E. Orthodox Diocese*, 426 U.S. at 712.

207. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.12, at 1242 (4th ed. 1991). See generally Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980) (Free Exercise and Establishment Clauses combine to require deference to church decisions.).

208. 494 U.S. 872, 878 (1990) (Burdens on religiously motivated acts or abstentions that result from the incidental effects of an otherwise valid, generally applicable criminal law do not transgress the Free Exercise Clause.).

209. As the dissent in *Smith* observed:

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

*Id.* at 907-09 and n.1 (Blackmun, J., dissenting). See Lupu, *Where Rights Begin*, *supra* note 18. 210. *Smith* at 877.

211. However, the *Smith* majority stated that government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Id.* (citation omitted); see *infra* notes 226-30 and accompanying text. Whether this means a controversy *purely* over religious dogma is uncertain.

212. It is my view that the constraints in this area should be more firmly grounded in an idea that government is simply incompetent to answer certain questions. Much of the commentary in

## 1. Intrachurch disputes

There is little difficulty with the conclusion that Presbyterians and Lutherans cannot ask a judicial officer which faith best knows God.<sup>213</sup> Indeed, for civil courts to answer questions of religious doctrine simply to resolve a doctrinal dispute between two warring religious factions would be a blatant step toward establishment. Although the Court has not confronted a case that was simply a dispute over religious doctrine, religious questions have arisen in litigation over matters within the realm of legitimate government concern, such as the ownership of property. The Court has explained the central constitutional prohibition in these terms:

In language having "a clear constitutional ring," [the Court] reasoned:

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who united themselves to such a body do so with an implied consent to this government, and are bound to submit it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."<sup>214</sup>

In addition, these cases also suggest that the Establishment Clause renders certain issues nonjusticiable. In the Court's words, "it is the essence of religious faith that ecclesiastical decisions are reached and are to be ac-

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this area has focused on the extent to which a free exercise principle of church autonomy is necessary to protect the religious liberty of church members. See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Laycock, *supra* note 202 (arguing in favor of such a principle); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) (arguing against constitutionally protected church autonomy).

213. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871). There is no difference between a statute that enforces one view of religious doctrine and a judicial ruling that has a similar effect.

214. *Serbian E. Orthodox Diocese*, 426 U.S. at 710-11 (emphasis omitted). *Watson* was a pre-*Erie* case decided under common-law principles.

cepted as matters of faith whether or not rational or measurable by objective criteria. . . . [Legal standards] are therefore hardly relevant to such matters of ecclesiastical cognizance."<sup>215</sup> Moreover, an ecclesiastical tribunal is the more competent, forum entitled to deference.<sup>216</sup>

For all of these reasons, church authority over various matters is quite broad. The following two post-*Lemon* cases illustrate this point. In *Jones v. Wolf*,<sup>217</sup> a majority of the members of the Vineville Presbyterian Church voted to split from the Presbyterian Church in the United States (PCUS) and affiliate instead with the Presbyterian Church in America (PCA).<sup>218</sup> The only litigated issue was which faction owned the local church assets. The split occurred in 1973, sixty-nine years after the local church's organization and affiliation with PCUS. After investigation, PCUS, which employed hierarchical, as opposed to congregational, governance, ruled that the minority faction loyal to PCUS was the true Vineville Presbyterian Church and, therefore, entitled to the church property.<sup>219</sup> At issue, in a sense, was whether the church property was held in trust for PCUS.

On one level, the court found the black-letter law clear. Civil courts cannot resolve church property disputes in a way which decides underlying questions of religious doctrine or practice.<sup>220</sup> Rather, a civil court must defer to the resolution of religious questions by religious bodies.<sup>221</sup> How-

215. *Id.* at 714-15. Compare this reasoning to the political question doctrine:

In *Baker v. Carr*, . . . we noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government. After reviewing our decisions in this area, we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various department on one question.

*Powell v. McCormack*, 395 U.S. 486, 518-19 (1969) (citations omitted). As a matter of language, at least, the parallels to the first three *Baker v. Carr* formulations are strong. The First Amendment is a "textually demonstrable constitutional commitment" of religious issues to another decision-maker; there are no judicial standards; and an initial nonjudicial policy determination may be unavoidable.

216. *Serbian E. Orthodox Diocese*, 426 U.S. at 686 n.8.

217. 443 U.S. 595 (1979).

218. *Id.* at 598. One hundred sixty-four members voted for the split, and 94 voted against the split.

219. *Id.*

220. *Id.* at 604.

221. *Id.*

ever, so long as government does not immerse itself in questions of religious doctrine, it can provide presumptive legal rules.<sup>222</sup>

The Court concluded that the "trust" issue did not necessarily implicate religious questions. Thus, the Constitution did not require Georgia to defer to the PCUS decision. The Georgia court could decide the dispute by reference to "neutral principles of law" in a manner which avoided impermissible resolution of an underlying question of religious doctrine.<sup>223</sup> The court could interpret the language of the deeds, which vested title in the local church. Next, it could examine state statutes on implied trusts and ownership of church property. Likewise, it could look to the corporate charter of the church, or in the constitution of the general church, to see if either indicated a trust in favor of the general church.<sup>224</sup> However, if the interpretation of the instruments of ownership or the church's governing documents turned on a religious issue, the court must defer to the church's decision on the religious question.<sup>225</sup>

The other post-*Lemon* case to consider judicial resolution of a church dispute, *Serbian Eastern Orthodox Diocese v. Milivojevic*,<sup>226</sup> centered on control of the Serbian Eastern Orthodox Diocese for the United States and Canada. The mother church defrocked and removed Bishop Dionisisje as bishop of the diocese, installed Bishop Firmilian as administrator of the diocese in his place, and reorganized the diocese into three parts. Bishop Dionisisje sued in Illinois state court to invalidate his removal and defrockment and the reorganization of the diocese, and sought to enjoin the mother church from interfering with assets controlled by the diocese.<sup>227</sup> The Illinois Supreme Court settled two key issues. First, it held that his removal and defrockment should be set aside as arbitrary and inconsistent with the mother church's constitution and penal code.<sup>228</sup> Second, it held that the reorganization was invalid because the mother church needed the approval

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222. "[T]he First Amendment [does not] require[ ] the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved." *Id.* at 605. After all, a state has an "obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where ownership of church property can be determined conclusively." *Id.* at 602 (citing *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 (1969)).

223. *Id.* at 600.

224. *Jones*, 443 U.S. at 601-03.

225. *Id.* at 604. A conclusion that the local church owned the property left open the question of who spoke for the local church. That question could be resolved in a like manner: by reference to local law and secular portions of church documents. *Id.*

226. 426 U.S. 696 (1976).

227. *Id.* at 697-708.

228. *Id.* at 708.

of the diocese.<sup>229</sup> In short, the Illinois Supreme Court found that the mother church acted inconsistently with its own norms.

The Supreme Court struck down the Illinois court's action on both issues. On the first issue, the Supreme Court held that review of the mother church's decision to remove and defrock Bishop Dionisisje, even under an arbitrariness standard, was foreclosed. Matters of church discipline, like matters of church theology, are outside the scope of judicial review:

[W]here resolution of [such] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity [or administration] before them.<sup>230</sup>

Indeed, a court cannot even decide where the focus of decision-making authority lies:

[C]ivil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide the case at hand] . . . .

Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.<sup>231</sup>

On the other issue, whether the mother church had the authority to reorganize the diocese, the Illinois Supreme Court found that the reorganization was "in clear and palpable excess of [the mother church's] own jurisdiction."<sup>232</sup> In reversing this decision, the Supreme Court stated that:

229. *Id.*

230. *Id.* at 709.

231. *Id.* at 708-09 (citations omitted). Despite this broad language, the Court left open the possibility of some review:

[W]hether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with the church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

*Id.* at 713 (footnote omitted).

232. *Id.* at 724.

[The Illinois Supreme Court] premised [its decision] on its view that the early history of the Diocese “manifested a clear intention to retain independence and autonomy in its administrative affairs while at the same time becoming ecclesiastically and judicially an organic part of the Serbian Orthodox Church,” and its interpretation of the constitution of the American-Canadian Diocese as confirming this intention. It also interpreted the constitution of the [Mother Church], which was adopted after the Diocesan constitution, in a manner consistent with this conclusion. . . .

[In so doing,] the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation.<sup>233</sup>

This a court may not do. Issues of church governance, like theological and disciplinary issues, are outside the purview of judicial power.<sup>234</sup> The Illinois Supreme Court violated the Constitution when it contravened the mother church’s decision as to the scope of its governing authority.<sup>235</sup>

233. *Id.* (citation to lower court opinion omitted).

234. “[R]eligious freedom encompasses the ‘power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *Id.* at 721-22 (citation omitted).

235. Again, the Court recognized the validity of inquiry into some threshold matters, like whether the diocese consented to the mother church’s control, although judicial inquiry even on that issue is circumscribed. For to delve too deeply:

[I]nto the various church constitutional provisions relevant to this [inquiry] . . . would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of [its] Holy Assembly.

*Id.* at 721.

The subordination of the Diocese to the Mother Church in such matters, which are not only “administrative” but also “hierarchical,” was provided, and the power of the Holy Assembly to reorganize the Diocese is expressed in the Mother Church constitution. Contrary to the interpretation of the Illinois court, the church judicatories interpreted the provisions of the Diocesan constitution not to interdict or govern this action, but only to relate to the day-to-day administration of Diocesan property. The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity.

*Id.* at 721-23 (footnotes omitted). In the course of this passage, the Court cited various provisions of the governance documents in three footnotes. *Id.* at nn.12-14.

## 2. Regulatory burdens

Each case finding regulatory oversight unconstitutional involved a program that provided aid to parochial elementary and secondary schools. In each case, regulatory oversight:

- (a) Involved resolution of religious questions and
- (b) Was substantial and ongoing.<sup>236</sup>

These limiting features are crucial. Unconstitutional entanglement has meant oversight over religious issues. Parochial schools are pervasively sectarian religious organizations in which the secular and religious cannot be separated. Hence, oversight would mean that government repeatedly would be required to settle religious disputes over which it has no competence. Consequently, subsidies to pervasively sectarian religious organizations are therefore unavoidable.<sup>237</sup> As such, they may not necessarily be fairly attributable to a government decision to subsidize religious activity.

In *Lemon v. Kurtzman*,<sup>238</sup> for instance, the Court invalidated the Rhode Island Salary Supplement Act, which authorized salary supplements to teachers of secular subjects in sectarian elementary schools.<sup>239</sup> To avoid the unconstitutional effect of subsidizing teachers who inculcate religion, the statute required that recipients teach only courses offered in public schools with texts and materials used public schools, and that they refrain from "teaching any course in religion."<sup>240</sup> Notwithstanding these restrictions, the court found that:

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

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular

236. If one views the problem as government competence to answer religious questions the issues in these cases become more sensible. Government is incompetent to answer religious questions; therefore, its executive branch may not undertake extensive oversight of definitionally religious issues.

237. See *supra* notes 122-28 and accompanying text. See also *Bowen v. Kendrick*, 487 U.S. at 649 (Brennan, J., dissenting) ("to implement the required monitoring, we would have to kill the patient to cure what ailed him").

238. 403 U.S. 602 (1971).

239. *Id.* at 609. The supplement could be in an amount up to 15% of the teacher's salary, but only to the level earned by public school teaches. Various restrictions applied; to be eligible, the teacher's school had to spend less per pupil than the state average in public schools. *Id.* at 609-10.

240. *Id.* at 619.

education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and *evaluation of the religious content of a religious organization* is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.<sup>241</sup>

More recently, in *Aguilar v. Felton*,<sup>242</sup> the Court invalidated a program to deliver remedial education to educationally deprived children. Under the New York programs at issue, full-time regular public school employees taught remedial courses and delivered counseling and other services in religiously affiliated schools. The sectarian school classrooms were cleared of religious symbols and religious materials were barred. Public school employees were required to avoid involvement in religious activities and to keep contact with private school personnel to a minimum. To ensure compliance with these requirements, field supervisors made one unannounced visit per term and reported to program coordinators, who also paid occasional unannounced visits.<sup>243</sup>

Arguably, teachers who taught classes could be "used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school" in violation of the second prong of *Lemon*.<sup>244</sup> Rather than reach this issue, however, the Court concluded that the program's efforts to police against unconstitutional effects impermissibly entangled government and religion. The Court's reasoning tracked *Lemon*:

[P]ervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter. . . . In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and

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241. *Id.* at 619-20 (emphasis added). In *Lemon*, the Court also struck down a similar Pennsylvania law for the same reasons. *Id.* at 620-22. Under the Pennsylvania statute, the state could purchase "secular educational services" from sectarian schools. *Id.* at 609-10. Reimbursement was limited to secular courses taught in the public schools, using approved texts and materials. *Id.* at 620-21.

242. 473 U.S. 402 (1985).

243. Ninety-two percent of the nonpublic schools to participate were sectarian. *Id.* at 406-07.

244. *Id.* at 409.

thus off limits in a Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved. . . .

[T]he detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."<sup>245</sup>

### 3. Executive Action in Other Contexts

The Supreme Court has never invalidated a formally neutral, generally applicable norm because its enforcement would cause unconstitutional entanglement. While the Court has suggested that the Constitution could invalidate regulatory oversight outside the context of religiously affiliated primary and secondary schools,<sup>246</sup> it appears that the analogy to the school aid cases would have to be quite strong.

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245. *Id.* at 413-14 (citations omitted). Other cases which involved aid to church-run primary and secondary schools have come to parallel conclusions. *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975); *see also Wolman v. Walter*, 433 U.S. 229, 254-55 (1977); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 748 n.15 (1976).

246. *E.g., Bowen*, 487 U.S. 589. When the Court considered whether the AFLA would necessarily result in excessive entanglement it offered these comments:

[T]here is no reason to assume that the religious organizations which may receive grants are "pervasively sectarian" in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees.

*Id.* at 616.

In *NLRB v. Catholic Bishop*,<sup>247</sup> all nine members of the Court believed that application of the National Labor Relations Act (NLRA) to lay teachers employed by church-operated schools threatened prohibited entanglement.<sup>248</sup> As a consequence, the five-member majority took pains to conclude that the NLRA did not apply.<sup>249</sup> This majority viewed the constitutional problem in these terms.

[When] charges of unfair labor practices [are] filed against religious schools . . . the schools ha[ve] responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. . . .

"[I]ntroduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." . . . . Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions. What we said in *Lemon* . . . applies as well here. . . .<sup>250</sup>

The Court's central concern was that government might resolve religious questions. Judges, not churches, might decide whether an employment related decision was required by church doctrine.<sup>251</sup>

247. 440 U.S. 490 (1979).

248. Compare *id.* at 501-04 (opinion of Burger, C.J.) with *id.* at 518 (Brennan, J., dissenting). The teachers would teach both secular and religious subjects.

Union organizations filed representation petitions with the NLRB for various religiously affiliated schools. In subsequent Board-supervised elections, unions prevailed and were certified as the exclusive bargaining representative for lay teachers. Nevertheless, the schools refused to recognize the unions and refused to bargain. The unions then filed unfair labor practice complaints. In defense, the schools claimed that they did not fall within the NLRB's discretionary jurisdiction, and that the First Amendment precludes exercise of jurisdiction anyway. *Id.* at 493-94.

249. *Id.* at 504-07.

250. *Id.* at 502-03 (footnotes and citations omitted).

251. In *Amos*, Justice Brennan concluded that the difficulty in distinguishing the difference between religious and secular activities of religious organizations justified a blanket presumption that nonprofit activities were religious. Justice Brennan explained:

In other cases, where the oversight neither involved a pervasively sectarian religious organization, nor otherwise involved resolution of religious questions, nor was substantial and ongoing, the Court has uniformly and quite easily found entanglement claims unpersuasive. The Court has rejected challenges springing from aid to religiously affiliated colleges and universities;<sup>252</sup> to the record-keeping provisions of the Fair Labor Standards Act;<sup>253</sup> to state sales and use tax laws;<sup>254</sup> and to the charitable deduction provisions of the Internal Revenue Code.<sup>255</sup>

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[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. . . . While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there would be no dispute. . . . As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

*Amos*, 483 U.S. at 343-44 (Brennan, J., concurring) (citation omitted). See also *Lee*, 112 S. Ct. at 2656 (Religious autonomy is protected when government cannot condition invitation to speak on religious speaker's agreement to restrict content of prayer.)

252. E.g., *Roemer*, 426 U.S. at 758-59 (In nonsectarian colleges and universities, secular activity can be separated from religious activity and entangling inspections are unnecessary); *Tilton*, 403 U.S. at 672.

253. In *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985), a unanimous Court easily brushed aside a claim that the record-keeping provisions of the Fair Labor Standards Act (FLSA), as applied to the foundation's *commercial* activities, caused an excessive entanglement with the foundation's religious endeavors. *Id.* at 305-06. The Court concluded that the FLSA, which "merely requires a covered employer to keep records 'of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him,'" involved only "routine and factual inquiries" that fell short of "the kind of government surveillance" which constitutes excessive entanglement. *Id.* at 305.

254. In *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), a unanimous court held that application of California's sales and use tax to the sale of religious materials did not foster an excessive government entanglement with religion. *Id.* at 397. To collect the tax would neither require an "official and continuing surveillance," nor an inquiry into the religious content of the merchandise or the religious motivation of sellers or purchasers. *Id.* at 395-96.

255. In *Hernandez v. Commissioner*, 490 U.S. 680 (1989), at issue was § 170 of the Internal Revenue Code, which allows deductions for contributions to charitable and religious institutions, like the petitioner's church, the church of Scientology. *Id.* at 689. The Court held that § 170 prohibited deduction of fixed fees paid for "auditing" and other spiritual services because the fees were not unrequited payments, but payments made in exchange for something. *Id.* at 684-85. In addition, the Court held that this scheme was consistent with the Establishment Clause: Excessive entanglement was avoided because the monitoring and administrative contact were minimal, and no inquiry into religious doctrine was necessary. *Id.* at 696-97. Indeed, the Court noted that to allow a deduction only for payment in exchange for religious services would threaten greater entanglement because it could require government to decide which services and benefits are religious. *Id.* at 694, 697. Likewise, attempts to determine how much of a payment for auditing

### E. *The Constraints at Intersection*

#### 1. Government support for private religious speakers: An issue of endorsement or subsidy?

The court's decisions involving government support for religious speech by a private speaker indicate some intersection between the prohibitions against endorsement and those against undue subsidy. The principles of endorsement forbid certain religious exhortations by government. This would mean little if government could simply substitute private persons for government employees and thereby avoid the constitutional restrictions. Thus, the prohibition against endorsement sometimes works to forbid government support for a religious message espoused by a private speaker.<sup>256</sup> Much religious activity, such as proselytizing, is also expressive.<sup>257</sup> Thus, the prohibitions against undue subsidies could likewise work to forbid government support of a religious message espoused by a private speaker.<sup>258</sup>

As noted earlier, the prohibition against endorsement is a limit on government speech; the restrictions on subsidies limit government donations.<sup>259</sup> Essentially, endorsement speaks to the status given a religious message and the expenditure of other government resources is incidental. By contrast, the subsidy cases are centrally concerned with distribution of other government resources. The expenditure of government funds is the essence of the constitutional transgression.

services was in exchange for the service and how much was a contribution could raise entanglement problems. *Id.* at 698 and n.12.

In dissent, Justices O'Connor and Scalia argued that the IRS policy at issue was a denominational preference invalid under *Larson v. Valente*. *Id.* at 713 (O'Connor and Scalia, JJ., dissenting).

256. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

257. See *Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (White, J., dissenting).

258. This is not to suggest that the more general endorsement inquiry employed by the Court with increasing frequency asks the right questions in subsidy cases. For example, in the last school-aid case, the Court suggested for the first time that government assistance may offend the constitution by sending a prohibited message. In *School Dist. v. Ball*, the Court found that the programs "foster[ed] a close identification of [government] powers and responsibilities with those of . . . religious denominations," and that this symbolic union of church and state conveyed an impermissible message of endorsement. *School Dist. v. Ball*, 473 U.S. 373, 389-92 (1985).

This statement highlights the poor fit between a generally applicable endorsement standard and the central inquiry in the subsidy cases. A general standard of endorsement would have independent vitality only when a program does not provide an impermissible subsidy yet *appears* to endorse religion. To make any sense in this context, endorsement must mean endorsement of the *religious* mission of the school. If the Court finds that an education program presents little or no risk that government employees or funds would support that religious mission, should the program nevertheless be invalid because some students erroneously perceive such support, or more vaguely make an association between government and religious education? See *id.* at 397.

259. See *supra* parts II B and C.

Most often, it will be easy to determine the applicable frame of reference.<sup>260</sup> Even the apparently difficult public forum cases, *Widmar v. Vincent*,<sup>261</sup> and *Board of Education v. Mergens*,<sup>262</sup> can easily be placed. At issue in *Widmar* was the open forum policy at the University of Missouri at Kansas City, under which the University made its facilities generally available to student groups. The University refused, however, to allow a student group to use University facilities for religious worship and discussion.<sup>263</sup> As a content based restriction on access to a public forum, the Court subjected the decision to strict scrutiny.<sup>264</sup> While the court assumed that avoiding an Establishment Clause violation would be a sufficiently compelling reason, the Court held that allowing the group equal access would not transgress *Lemon*. To the Court, the issue was whether the access would run afoul of *Lemon's* proscription against the primary effect of advancement of religion. Under this standard, the Court held the benefits were "incidental": The policy did not evidence an intent to approve religion, and the benefits did not go mostly to religious groups.<sup>265</sup>

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260. In any event, to the extent that it is difficult to determine whether status or support is the root issue, it is unlikely that the two constraints would lead to different results. It is hard to imagine that a subsidy which cannot be fairly attributed to a government decision to subsidize the religious speech and which is constitutionally tolerable will nevertheless send a message that government endorsed religion, and vice versa. In the public forum cases discussed in this Section, for example, the Court concluded that to grant religious speakers access to the expressive forum did not send a message that government endorsed religion. The nondiscrimination which is the hallmark of a public forum, and the fact that the policies benefitted a wide array of groups, negated a message of endorsement. Likewise, in neither case did the policy fairly evince a government decision to subsidize the religious speech.

261. 454 U.S. 263 (1981).

262. 496 U.S. 226 (1990).

263. *Widmar*, 454 U.S. at 265.

264. *Id.* at 270.

265. The Court concluded:

[T]his Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. . . .

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. . . .

Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. . . . If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." A least in the absence of empirical evidence that the religious groups

*Board of Education v. Mergens*,<sup>266</sup> involved the Federal Equal Access Act, which sought to extend the reasoning of *Widmar* to public secondary schools.<sup>267</sup> Under the Act, a school that maintains a "limited open forum" cannot discriminate against students groups on the basis of the religious or other contents of speech.<sup>268</sup> The Court held that this requirement did not violate *Lemon*.<sup>269</sup> Six Justices concluded that the act had no unconstitutional effect because the school did not send a message to its students that it endorsed religion.<sup>270</sup>

Both *Widmar* and *Mergens* involved programs that offered general benefits and clearly served a legitimate secular objective. The essential government activity was not communication of a particular message with a

will dominate UMKC's open forum . . . the advancement of religion would not be the forum's "primary effect."

*Id.* at 273-75 (citations omitted).

266. *Id.* at 235-37.

267. *Id.*

268. *Id.* at 235. The religious classification in *Mergens* is consistent with the equality cases. Eight Justices accepted the plurality's determination that the predominant secular purpose of the Act was to prohibit discrimination against religious and other types of speech.

269. *Id.* at 250.

270. *Id.* Justices O'Connor, Rehnquist, White, and Blackmun concluded that:

[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

*Id.* (opinion of O'Connor, J.) (citations omitted). Several factors limited the risk of endorsement. The Act limits participation by school officials and requires that meetings be held during non-instructional time, thereby eliminating the problems of students emulating teachers and of mandatory attendance. *Id.* at 250-51. Moreover, "the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs . . . counteract any possible message of official endorsement of or preference for religion or a particular religious belief." *Id.* at 252.

Justices Marshall and Brennan, O'Connor, Rehnquist, White, and Blackmun all agreed that the school must not send a religious message, but disagreed about how far apart the school must stand from religious speech to avoid "a message that the school endorses rather than merely tolerates that speech." *Id.* at 264 (Marshall, J., concurring).

Justice Kennedy would find a constitutional violation only if the school coerced students into participating into a religious exercise. *Id.* at 261-62 (Kennedy, J., concurring). He finds the endorsement inquiry no help because:

[A] public high school "endorses" a religious club, in a common-sense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment.

*Id.* at 261.

religious component. Thus, broadly speaking, the cases present a question of subsidy, not endorsement. This conclusion is reinforced by reference to the elements of the constitutional prohibitions.

Recall the elements of the endorsement inquiry:

- (1) The activity in question was in its essence expressive;
- (2) government gave its approval to the specific message sent by the expressive activity; and
- (3) a reasonable observer would receive the message that government endorsed religion.

Compare the elements of the endorsement inquiry with the elements that define undue subsidy:

- (1) A subsidy;
- (2) which directly underwrites specifically religious activity; and
- (3) which can fairly be attributed to a government decision to subsidize the specifically religious activity.

Plainly, government did not give *specific* approval of the particular religious messages at issue in *Widmar* or *Mergens*.<sup>271</sup> Thus, the inquiry never proceeds to the crux of the constitutional issue: whether a reasonable observer would receive the message that government supported religion.

Under the subsidy framework, however, the public forum cases would proceed to the core constitutional problems. Access to school facilities would be in-kind support which would directly underwrite specifically religious activity. Thus, it would be necessary to decide whether allowing religious groups access to such a public forum can be fairly attributable to a government decision to subsidize specifically religious activity. To impose a restriction against religious use would clearly thwart the legitimate objectives of an open forum program: Content-based restrictions on speech are definitionally incompatible with a public forum for expression. In such circumstances, government cannot necessarily be said to employ the policy *because* of the benefit religious activity would thereby receive. The question, therefore, becomes whether the benefit is nevertheless an unconstitutional subsidy.<sup>272</sup> On this issue, four points need to be addressed.

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271. See *supra* notes 260-70 and accompanying text.

272. Commentators have generally agreed that equal access for religious speakers is consistent with the Establishment Clause. See Laycock, *supra* note 142, at n.12 (1986). *Contra* Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw. U. L. REV. 174 (1986) (arguing that access is not neutral); Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public Schools: A Proposal for a Unitary First Amendment Forum Analysis Test*, 21 HASTINGS CONST. L.Q. 529 (1986).

First, it is against the very essence of an open forum to exclude a class of speakers based on the content of their speech. That is, there is no way to both avoid the benefit to religion and maintain the program's fundamental premise. Second, the values served by the open forum policies are of constitutional significance. An open forum policy promotes both free speech and free exercise values.<sup>273</sup> A activity must run afoul of a very strong policy of disestablishment to justify the subordination of other First Amendment principles.<sup>274</sup> Third, there could be no claim that the open forum policies were merely a guise under which government could underwrite religious activity. The subsidy to religious activity was truly incidental to broader program objectives.<sup>275</sup> Finally, in *Mergens*, government took pains to ensure that the policy would not create opportunities for impermissible religious speech by government.<sup>276</sup> Thus, government attempted to prevent constitutional injury.

For many of these same reasons, Douglas Laycock has argued that equal access policies are consistent with an overriding Establishment Clause principle of neutrality.<sup>277</sup> Professor Laycock states that the subsidy "arguments are put in context when we recognize that the "effects" test [of *Lemon*] was intended to implement the neutrality requirement." The subsidy is "incidental" to a policy of neutrality between religious and other speech and is therefore permissible. The heart of the issue, however, is more accessible through the elements of undue subsidy outlined above. Neutrality is too abstract to suffice as decision-making construct.<sup>278</sup> But neutrality can be given content by reference to the requirement that a subsidy be fairly attributable to a government decision to subsidize the specifi-

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273. See *Mergens*, 496 U.S. at 247; see also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

274. Whether the constitution should allow a similar subsidy incident to a policy of lesser importance is an open question. But this does not mean that the importance of the government interest underlying a given policy must be compared to the degree of constitutional injury. A lesser policy might simply give rise to an inference that the justification is a sham, that the benefit to religion is not truly "incidental." In such circumstances, the subsidy might fairly be attributed to a government decision to underwrite the specific religious activity.

275. This conclusion might be unwarranted, for instance, if program benefits went almost exclusively to religious organizations.

276. *Mergens*, 496 U.S. at 235-37.

277. Professor Laycock argues that the Constitution requires equal access for religious speech. Laycock, *supra* note 140.

278. Indeed, Professor Laycock has noted that neutrality is not self-defining and has been used to mean quite different things. See Laycock, *supra* note 19. See also Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986) (agreeing that religious speakers should have a right of access but arguing that neutrality is an insufficient concept to protect religious liberty); Ruti Teitel, *When Separate is Equal*, *supra* note 272, (arguing that access is not neutral); Ruti Teitel, *The Unconstitutionality of Equal Access Policies*, *supra* note 272.

cally religious activity.<sup>279</sup> Deviation from neutrality is easy to see when a program is directed to support the religious activities of religious groups, or when government fails to employ restrictions to avoid direct support of religious activity when such restrictions are consistent with the program's ends.

2. *Wallace v. Jaffree, Edwards v. Aquillard, and Bowen v. Kendrick*

(i) *Wallace v. Jaffree: Illicit classification or religious speech?*

In *Wallace v. Jaffree*,<sup>280</sup> the Court struck down an Alabama statute that authorized a moment of silence "for meditation or voluntary prayer . . ."<sup>281</sup> The majority affirmed the conclusion that the only purpose of the new statute was to "express [ ] the State's endorsement of prayer [and that] . . . the addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice."<sup>282</sup> The statute thus violated the first prong of *Lemon*. In addition, part of the decision treated the statute as a precatory comment<sup>283</sup> and analyzed the case as a limit on government speech. The Court stated that:

[T]he addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. . . . [We cannot] treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."<sup>284</sup>

Under the models developed in this paper, Alabama can be seen to have employed a religious classification without sufficient justification. Because the Court concluded that there was no barrier to voluntary prayer during the moment of silence, the law lifted no barrier to religious exercise.<sup>285</sup> The difficulty with characterizing the law as one that employed a religious classification is that no government benefit or burden turned on whether what one was doing qualified as "voluntary prayer."<sup>286</sup> Except, that is, benefits

279. See *supra* part II.B.[3].

280. 472 U.S. 38 (1985).

281. *Id.* at 40.

282. *Id.* at 60.

283. *Id.* at 60-61 (This case involved "symbolic speech on behalf of the political majority.")

284. *Id.* at 60-61 (footnotes omitted). The Court easily concluded that it did. *Id.*

285. *Id.*

286. There was no credible claim that the inclusion of "voluntary prayer" was necessary to remove an ambiguity over whether prayer was permitted. *But see id.* at 91 (White, J., dissenting) ("I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray"). See Laycock, *supra* note 140, at 57-60 (meditation can connote prayer). Most of

and burdens which flow from a religious statement by government. Those who wished to pray were entitled to nothing more than those who did not. Thus, while the equality framework seems a better doctrinal fit, the endorsement inquiry seems closer to the point.<sup>287</sup>

(ii) *Edwards v. Aguillard: Illicit classification or endorsement of religious speech?*

In *Edwards v. Aguillard*,<sup>288</sup> the Court invalidated the Louisiana "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act for want of a clear secular purpose.<sup>289</sup> Although the statute did not mandate that either the theory of evolution or "creation science" be taught in the public schools, it did require that if one was taught, both be taught.<sup>290</sup>

The Court's analysis fits within the principles of equality. The Court found that the facially neutral reference to creation-science was, in reality, a religious classification.

There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. . . .

The preeminent purpose of the Louisiana Legislature was clearly to advance the religious view that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act.

. . . .

The Legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint.<sup>291</sup>

The Court also concluded that the law lacked a sufficient justification. Louisiana claimed the law advanced "academic freedom." The Court found, however, that academic freedom was not forwarded by limiting a

the time, for government to define a classification as one which includes religion or religious activity will not send a message that religion or religious practice or belief is preferred.

287. To be sure, the problem is unusual. Few statutes will be found to be mere statements of government opinion.

288. 482 U.S. 578 (1987).

289. *Id.* at 585.

290. *Id.* at 581.

291. *Id.* at 590-593 (footnotes omitted).

teacher's discretion over what to teach.<sup>292</sup> Hence the Court took academic freedom to mean a requirement that "all the evidence be taught." The Court found, though, that no barrier existed to the teaching of the scientific evidence for creationism.<sup>293</sup>

The decision also fits within the endorsement paradigm.<sup>294</sup> Indeed, it seems clear that the case meets the elements of unconstitutional endorsement outlined earlier in this paper. Teaching is essentially expressive; Louisiana gave its specific approval to the doctrine of creation-science; and, under the Court's reasoning, a reasonable observer would perceive that Louisiana favored a particular religious belief.

Indeed, the endorsement inquiry may be more to the point. The constitutional problem is that government chose to send a religious message. Benefits and burdens attendant to the law result from one's identification with the message. Perhaps *Edwards* illustrates that the principles of equality and endorsement can embrace consonant values. Here, government employed a religious classification in order to send a religious message. Again, this is an unusual case; seldom will a statute require someone to speak.

(iii) *Bowen v. Kendrick: Illicit classification, endorsement, or subsidy?*

At issue in *Bowen v. Kendrick*<sup>295</sup> was the Federal Adolescent Family Life Act (AFLA), which sought to address problems associated with teenage sexual activity and pregnancy. The AFLA provided grants to public and private nonprofit groups who provide "services and research in the area of premarital adolescent sexual relations and pregnancy."<sup>296</sup> Grant recipients provided "care services" to help care for pregnant adolescent women and adolescent parents, and to "prevention services" that work toward the prevention of adolescent sexual relations.<sup>297</sup>

While the AFLA leaves it up to the Secretary of Health and Human Services . . . to define exactly what types of services a grantee must provide, . . . the statute contains a listing of "necessary services" that

292. *Id.* at 586-587.

293. *Id.* at 587.

294. *Id.* at 608 (O'Connor, J., concurring) ("[T]he First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson v. Arkansas* . . . .) The Court also placed emphasis on the fact that school children make an impressionable audience and that they are required by law to attend school. *Id.* at 584.

295. 487 U.S. 589 (1988).

296. *Id.* at 593.

297. *Id.* at 594. Grantees could not provide family planning services unless otherwise unavailable in the community and could not "advocate, promote, or encourage abortion." *Id.* at 596-97 (footnote omitted).

may be funded. These services include pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and perhaps most importantly for present purposes, "educational services relating to family life and problems associated with adolescent premarital sexual relations". . . .<sup>298</sup>

In addition, the Act's statement of purposes and findings noted that the problems addressed by the Act, "are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives."<sup>299</sup> Funded projects, therefore, must "use such methods as will strengthen the capacities of families . . . to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations."<sup>300</sup>

The Court addressed two challenges to the AFLA on its face. First, the Court addressed whether the required involvement of religious organizations would have the primary effect of advancing religion.<sup>301</sup> Second, the Court addressed the claim that grants to religious organizations might underwrite religious indoctrination, because educational services contemplated by the AFLA coincide with religious teachings.<sup>302</sup>

As to the first challenge, the Court found the required involvement of religious groups constitutional. The effect of advancing religion was "at most 'incidental and remote.'"<sup>303</sup>

In addition, although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services under the Act, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector . . . . In our view, this reflects the statute's successful maintenance of a course of neutrality among religions, and between religion and non-religion."<sup>304</sup>

The Court also refused to invalidate the AFLA merely because religious organizations are eligible grantees. On this issue, the Court treated the case

298. *Id.* at 594; see 42 U.S.C. § 300z(a)(8)(B), (a)(10)(c) (1988).

299. *Id.* at 595.

300. *Id.* at 596. As a consequence, grant applicants must describe how they will involve such groups. *Bowen*, 487 U.S. at 596.

301. 487 U.S. at 605-06.

302. *Id.* at 606.

303. *Id.* at 607 (citations omitted).

304. *Id.* (citations and footnote omitted).

as an analog of aid to religious education. The law was neutral and nothing "indicate[d] that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions" akin to religiously affiliated primary and secondary schools.<sup>305</sup> Thus, the AFLA was more like aid to religiously affiliated colleges and universities than to sectarian elementary and secondary schools.<sup>306</sup> As a consequence, the *possibility* that some aid would go to pervasively sectarian religious organizations or underwrite religious indoctrination was an insufficient reason to invalidate the AFLA on its face.<sup>307</sup> The Court's inquiry then turned to whether any grantees in fact used program funds to promote religious doctrine,<sup>308</sup> or whether funds could be channeled solely to secular activities. On this point, the majority remanded the case for the development of a more complete record.<sup>309</sup>

Under the models developed in this paper, the AFLA arguably embodies an illicit religious classification by virtue of the provisions that require involvement of religious groups. One interpretation of the majority opinion, however, is that the AFLA does not distinguish between religious and analogous secular activity. Instead, the AFLA simply lists the set of groups to be involved, religious and nonreligious. A classification does not become religious merely because religious groups fall within it. Likewise, a classification should not become religious merely because it is defined to include religious groups. Accepting this determination, the AFLA passes the initial hurdle of regulatory equality.

If used to underwrite religious indoctrination, the AFLA would easily meet the elements of a prohibited subsidy consisting of cash support for specifically religious activity. Moreover, any subsidy in *Bowen v. Kendrick* would be fairly attributable to the government. If government deliberately chose to employ religious organizations who used religious doctrine to counsel against pregnancy, it would have selected religious means to forward the goals of the program. If government did not so choose, but that was the effect of the program anyway, the subsidy would still be fairly attributable to government, because government would have failed to enforce existing conditions on the grants which forbade religious teaching.<sup>310</sup>

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305. *Id.* at 610.

306. *Bowen*, 487 U.S. at 610-12.

307. *Id.* at 611-13.

308. *Id.* at 620-22. Of the five members in the majority, three would apparently find aid to a pervasively sectarian institution, without more, a violation. Two would not. *See id.* at 624-25 (Kennedy, J., concurring).

309. *Id.* at 620-21.

310. *Id.* at 616, 623. Professor McConnell argues that religious organizations should be subject to only those conditions on receipt of program benefits to which secular recipients are subject. Thus, the conditions on program funds in *Tilton v. Richardson*, *supra* notes 113-116, should be

Viewed either way, government went forward without religious use restrictions *because* of the benefit it would thereby confer on religious activity.

### III. CONCLUSION

In the era of *Lemon v. Kurtzman*, the Establishment Clause has served as an umbrella under which four essentially separate constitutional protections have gathered. Each of the four protects against government activity that most would view as plainly incompatible with minimum constitutional standards of disestablishment. Properly understood, each is well suited to address these underlying, animating concerns. And, properly understood, each can be seen as a rather narrow constraint that has not extended far beyond core concerns.

Few would argue that a law which awards government contracts first to atheists, or which allows only Seventh Day Adventists to be pharmacists, is constitutionally unobjectionable. The first protection guards against this problem. The Establishment Clause embodies a principle of religious equality that works like the principle of racial equality contained in the Equal Protection Clause. Government may neither impose burdens nor distribute benefits on the basis of religious affiliation. Religious classifications, especially those that manifest a denominational preference, bear a heavy presumption of invalidity. For the most part, the principle of religious equality makes religious affiliation legally irrelevant. Indeed, religious classifications have been accepted for only one reason: to remove a burden on religious exercise. Even then, the law must carefully serve that purpose. This should not be seen to understate the significance of defining the bounds of permissible government accommodation of the free exercise of religion; this is one of the unresolved issues of signal importance.

The second protection is against undue government subsidy of religious activity. Again, few would posit that the Constitution imposes no barrier to a city's plan to divide its tax revenue among local churches. In this vein, the cases have forbidden government programs targeted to support the religious activities of religious organizations. One might take issue with the Court's decision to equate religiously affiliated primary and secondary

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invalidated. *McConnell*, *supra* note 74, at 184. However, in *Bowen v. Kendrick* government could forbid religious teaching because the AFLA "was not a program that permitted free speech about controversial topics of the grantees' choice." *Id.* at 187. This effort to distinguish *Bowen v. Kendrick* from *Tilton v. Richardson* is unpersuasive. In *Bowen v. Kendrick*, grant recipients were not just forbidden from speaking on sundry controversial topics of the recipient's choice. Rather, religiously affiliated grant recipients could not articulate their religious basis for backing the very message that the program sought to send. Presumably, other grant recipients could give their reasons for counseling against adolescent sexual activity.

schools with churches, and equate their educational functions with proselytizing. Nonetheless, it does not take a far-reaching idea of subsidy to strike down a program designed to support the religious activities of churches. Broader programs have routinely been allowed to provide aid to the secular activities of religiously affiliated organizations. Indeed, at least in some circumstances, aid can even go to the religious activities of religious organization, if that is the unavoidable consequence of staying true to the program's objective. Creating a mechanism to evaluate such unavoidable subsidies is perhaps the second issue of signal importance.

The third protection is against religious exhortations by government. Again, few would find fault with a constitutional rule that forbade government from painting "Offer up your devotions to God your Creator, and his Son Jesus Christ, the Redeemer of the world!" in giant red letters spread from the top to the bottom of the Washington Monument. I suspect it would make little difference to most people whether government employees or private citizens did the painting. If some religious statements violate the Constitution, and others do not, the constitutional standard must separate the permissible from the forbidden. That is the defining focus of the endorsement inquiry. To gain wide acceptance of a single method for determining when government crosses the constitutional line is the unfinished task in this area.

The fourth and final protection is against government intrusion into certain church affairs. Once more, few would say that a judge should hear a woman's claim that the Roman Catholic Church misconstrued scripture when it decided that women shall not be priests. The Constitution essentially renders such questions of church doctrine, discipline, and governance nonjustifiable. Analogous principles restrain executive action. Government may not enforce regulations that contemplate ongoing and extensive administrative oversight and require government to resolve religious issues. By default, churches retain autonomy over certain matters. Whether this group of decisions is a closed set remains to be seen.

That is not to say that the prohibitions are unrelated. There is a single prohibition against laws respecting an establishment of religion. Yet the same wrong, broadly speaking, may manifest itself in various forms of government behavior. Justice O'Connor may have identified the chief constitutional evil: Where government practices "make religion relevant, in reality or public perception, to status in the political community."<sup>311</sup> Still, a single constitutional standard is clumsy method for discerning even this single wrong in various contexts. Government may make religion relevant to

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311. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1989).

one's standing in the political community in different ways depending on whether government acts as lawmaker, speaker, benefactor, or judge.

Indeed, almost by definition, illegitimate lawmaking, illicit giving, government proselytizing, and religious refereeing take divergent shapes. Any unitary approach to Establishment Clause problems is therefore likely to be too general to be sufficiently focused in many cases. When does a regulation have an unconstitutional effect of advancing religion? When it employs a religious classification. When does a social welfare program endorse religion? When, in fact, government directs an unnecessary subsidy to religious activity. Constitutional constraints should be fitted to the particular constitutional evil. The models developed in this paper work toward this end.

A judicial opinion designed to recast the existing constraints of the establishment clause in terms sensitive to the differing nature of these four problems might look something like this:

"In *Lemon*, the Court identified the "three main evils against which the establishment clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Waltz v. Tax Commission*, 397 U.S. 664, 668 (1970). In the more than two decades since, the cases have employed four constraining principles, in large part to protect against those problems.

*First.* Principles of equality restrain the imposition of burdens or the provision of benefits on religious grounds. Thus, classifications which purposefully discriminate on the basis of denominational affiliation are subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228 (1982). Other religious classifications have been justified only as a means of removing a barrier to religious exercise. *E.g.*, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (regulatory barrier to religious exercise). *C.f.* *Board of Education v. Mergens*, 496 U.S. 226 (1990) (barriers to religious speech and association); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (state could excuse religiously motivated activity from otherwise applicable restriction on payment of unemployment compensation benefits); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (Sabbath observance not grounds for discharge by private employer.). Even then, the effort to accommodate religious exercise must be closely tailored to that end. *Larson v. Valente*, 455 U.S. 252 (denominational preference too blunt a mechanism). *See also* *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (underinclusive classification invalidated); *Estate of Thornton v. Caldor*, 472 U.S. 703 (Burden on third parties must be considered.).

*Second.* Government may not provide an undue subsidy to religious activity. This principle is violated if:

- [a] a subsidy;
- [b] directly underwrites specifically religious activity; and
- [c] can fairly be attributed to a government decision to subsidize the specifically religious activity.

The benefit at issue in these cases is a grant of gift or money, or some support in-kind. The first element therefore distinguishes government action which is judged by the principles of equality. *Compare* Estate of Thornton v. Caldor, 472 U.S. 703 (benefit a result of a regulatory preference for religious activity) *with* Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (Formally neutral program provided an undue subsidy.).

Presumptively, government aid to pervasively sectarian religious institutions, like sectarian primary and secondary schools, underwrites religious activity. A very high showing that the aid will be used for only secular purposes is required to overcome this presumption. Financial aid is almost categorically prohibited. *E.g.*, *Nyquist*, 413 U.S. 756; *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 471 (1973). Many forms of non-financial aid are likewise forbidden. *E.g.*, *School District v. Ball*, 473 U.S. 373 (1985). *Compare* *Wolman v. Walter*, 433 U.S. 229 (1977). On the other hand, if the recipient is not a pervasively sectarian religious organization, government need make less of a showing that the aid will not underwrite religious activity directly. *See* *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Tilton v. Richardson*, 403 U.S. 672 (1971) (religiously affiliated colleges and universities).

The third element requires that decision to support the religious activity be fairly attributable to the government. Fair attribution has been present when the program itself was directed to support the religious activities of religious groups, *Ball*, 473 U.S. 373, or when government failed to employ restrictions to avoid direct support of religious activity, *at least to the extent that restrictions would not frustrate the program's ends*. *Compare* *Tilton*, 403 U.S. 672 (restrictions on religious use employed and program upheld) *with* *Widmar v. Vincent*, 454 U.S. 263 (restrictions on religious use would frustrate program ends). The intervening decision of a third party can negate attribution of the subsidy to the government. *Whitters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). *Compare* *Mueller v. Allen*, 463 U.S. 388 (1983) (role of third party choice sufficient) *with* *Nyquist*, 413 U.S. 756 (role of third party choice insufficient).

*Third.* There are limits on religious exhortations by government. Religious speech by government violates the establishment clause when:

- [a] the activity in question was in its essence expressive.
- [b] government gave its approval to the specific message sent by the expressive activity, and
- [c] a reasonable observer would receive a message from government that religion or a particular religious belief is favored or preferred.

The first element limits the reach of this constitutional prohibition to religious speech. *E.g.*, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (prayer); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (display of religious symbol); *Stone v. Graham*, 449 U.S. 39 (1980) (display of religious text).

The second element requires that government can fairly be said to have made a choice to support the particular message. This can mean that government sent the message, *Wallace v. Jaffree*, 472 U.S. 28 (1985) (precatory statute), or that government selectively facilitated the message. *E.g.*, *Lee*, 112 S. Ct. 2649 (government selected speaker and message at public school graduation); *County of Allegheny*, 492 U.S. 573 (Government sponsored creche display and gave special access to government property.). *Compare Widmar*, 454 U.S. 263 (1981) (public forum).

The third element sets the constitutional boundaries. The question is whether a reasonable observer, aware of all the salient facts, would perceive government favoritism for religion or a particular religious belief. *See County of Allegheny*, 492 U.S. 573. *Cf. Lynch v. Donnelly*, 465 U.S. at 687-89 (O'Connor, J., concurring). This inquiry is undertaken "with a sensitivity to the unique circumstances and context of a particular challenged practice." *County of Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring). Nevertheless, four factors emerge as dispositive: the strength and clarity of the religious message; the extent to which government can be seen to stand behind the message; the audience to whom the message is sent; and whether any contextual factors, like the history and ubiquity of the practice, tend to negate the message that government has endorsed religion. *See, e.g., id.; Lee*, 112 S. Ct. 2649.

*Fourth.* The Establishment Clause disables government from resolving religious questions, and thereby leaves a zone where religious organizations retain autonomy. The Establishment Clause renders nearly all decisions as to a church's creed, governance, or discipline nonjusticiable. *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Similarly, the Establishment Clause can forbid offensive regulatory

supervision by administrative officials. At a minimum, government may not enforce regulations when to do so would require administrative resolution of religious issues and mandate extensive, ongoing oversight. *E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Compare* *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (substantial oversight of religious matters raised constitutional issues) with *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (relatively insubstantial oversight of secular matters constitutional).”