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EQUAL TREATMENT IS NOT ESTABLISHMENT

EUGENE VOLOKH*

Does the Constitution require discrimination against religious schools and against parents who choose them?

This question is the heart of the Establishment Clause debate over school choice. May the government treat government-run schools, secular private schools, and religious schools equally, supporting children's education regardless of the religiosity of the school to which the children go? Or must the government exclude religious schools from this generally available benefit?

Casting the matter in terms of discrimination frames the issue in a stark light, but such a characterization is accurate: Discrimination is indeed what it's all about. Fair-minded people may argue that the Constitution does require such discrimination; not all discrimination is bad. But there should be no denying that a constitutional rule excluding religious schools from generally available benefits rests on the theory that discrimination is constitutionally mandated.

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This article is built on a large body of scholarship by those who have worked in this field much longer and more deeply than I have; I cannot give pinpoint cites to each piece precisely because my thinking has been so permeated by theirs. Some particularly good examples (though ones with which I may differ on some particulars) are: Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 183-87 (1992); Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373.

My aim here is more to summarize and elaborate on the existing arguments in favor of the constitutionality of school choice, not to break any new theoretical ground; Part E, though, should be relatively novel, as should some of the material in Parts B.2-D.

A. "NO MONEY FLOW" VERSUS EQUAL TREATMENT

1. *No Money Flow*

The chief argument for a constitutional rule of mandatory discrimination against religious schools has been the "no money flow" theory. The Constitution, the argument goes, does require that religious schools and institutions be excluded from evenhanded, generally available funding programs, because it's wrong for taxpayer money to indirectly flow to religious teaching.

In the words of Kathleen Sullivan, "the establishment clause necessarily requires that government 'disfavor' religion in relation to secular programs," because "government [may not] make us pay taxes to be used for religious indoctrination in faiths we may not share."¹ Or, as the ACLU argued, the Wisconsin Supreme Court's upholding an evenhanded school choice program should be condemned because under it "Wisconsin taxpayers will be coerced into supporting religions, including sects and cults, with which they may not agree."²

But is there really something wrong with tax money flowing, through private choices made under neutral funding programs, to religious institutions? Consider four ways in which this can happen:

1. The government takes our taxes and gives college students GI Bill funds, Pell grants, and vocational education funds for the handicapped, usable at any accredited college, whether religious or not (even one run by, horror of horrors, a "sect" or "cult"). A student uses this money for pervasively religious education, for instance studying theology at Notre Dame, or even studying to be a minister at a seminary.³

2. The government takes our taxes and gives them out as government salaries or as welfare. An employee or welfare recipient contributes some of this money to a church or synagogue, for purposes of religious teaching and ritual or for the pervasively religious education of his children.

3. The government exempts charitable contributions from the income tax, thus in effect subsidizing charitable spending, whether religious or not. As the Supreme Court has held, "Every

1. Kathleen Sullivan, *Debate with Michael McConnell*, SLATE (Dec. 18, 1998) <<http://www.slate.com/dialogues/98-12-09/dialogues.asp?iMsg=2>> and (Dec. 30, 1998) <<http://www.slate.com/dialogues/98-12-09/dialogues.asp?iMsg=4>>.

2. *ACLU Says Wisconsin Ruling on Vouchers Leaves Students With No Choice for Religious Liberty* (June 10, 1998) <<http://www.aclu.org/news/n061098a.html>>.

3. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (holding that the Establishment Clause wasn't violated by a person using vocational education funds for the blind to study to be a minister).

tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors.”⁴ A taxpayer routes some of this subsidy—which ultimately comes out of your and my taxes—to a church, for purposes of general religious teaching and ritual, or even to a specific fund for the pervasively religious education of others’ children.

4. The government takes our taxes and gives parents education vouchers usable at any accredited school, whether religious or not. A parent takes this money and uses it for the pervasively religious education of his children.

All four examples are structurally identical: Money flows from taxpayers to the government to recipients of government funds, and then, because of the recipients’ individual choices, to a religious use. If the “no money flow” theory is right, then all these examples are unconstitutional. The GI Bill and Pell grant programs *must* discriminate against religious colleges. Welfare recipients or government employees *must* be barred from donating any of their income to churches or from spending it on their children’s religious educations. The tax system *must* discriminate against religious charitable contributions. But surely this can’t be so.

Surely the first three examples show us that there’s nothing wrong in tax money flowing to religious uses as such (though there may be something wrong in tax money flowing to religious uses under a government program that discriminates in favor of such uses). And if that’s true, then the no-money-flow argument against K-12 school choice collapses.

But wait, some say, surely these examples are different. But how are they different? It’s not enough to just fit them into a different mental box, for instance the “bulk payment” box rather

4. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (plurality) (saying this in the Establishment Clause context); *id.* at 28 (Blackmun, J., concurring in the judgment) (describing a tax exemption for religious publications as “preferential support for the communication of religious messages,” which suggests that tax exemptions generally are “support” for the exempted material, whether preferential or not); *see also* *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (in the Free Exercise Clause context) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’”); *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (in the Free Speech Clause context) (“Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. . . . Deductible contributions are similar [though not identical] to cash grants of the amount of a portion of the individual’s contributions.”).

than the "school choice" box, or the "tax deduction" box rather than the "subsidy" box. One must point to some difference that explains why one form of money flow to religion is permissible and another is not.

And I can see no such differences. The no-money-flow argument can't, for instance, distinguish higher education (as in the GI Bill or Pell grants) from K-12 education, because the theory at the core of the no-money-flow argument—the notion that my money shouldn't indirectly flow to religious uses of which I disapprove—is completely unrelated to any such distinction. Both, after all, can involve tax money indirectly flowing to "pervasively sectarian" religious teaching. What's more pervasively sectarian than a seminary education, the very sort of education that the Supreme Court unanimously said may be funded with even-handed, generally available funds for education for the blind?⁵

Likewise, the no-money-flow argument can't distinguish school choice funds from government salaries or welfare payments contributed to religious uses on the grounds that special-purpose vouchers are somehow different from general-purpose payments. Both involve money indirectly flowing from taxpayers through recipients of government funds to religious institutions. Both involve private choices uninfluenced by any government preference for religion. If money may flow to religious uses through donations by government workers or welfare recipients, this can only be because tax money *may* flow to others' religious uses, so long as it gets there without any government preference for religion.

Similarly, the no-money-flow argument can't distinguish "bargained-for" funds, such as government salaries,⁶ from

5. See *Witters*, 474 U.S. 481 (unanimously upholding such a program). I have heard some try to distinguish the two on the grounds that K-12 education involves "indoctrination" of impressionable children, while college education involves an adult audience; but this can only be relevant when the question is whether the audience is coerced by government speech. See *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (striking down graduation prayers at government-run high school as unduly coercive "for a dissenter of high school age" but reserving judgment as to whether such prayers would be permissible "if the affected citizens are mature adults"); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (upholding graduation prayers at government-run university, partly on the grounds that the audience consists of "mature attendees"). When the students are present by their own choice or by the choice of their legal guardians, the inquiry can't focus on whether they are being coerced by the religious instruction, but only on whether the indirect spending of taxpayer money on this instruction violates the taxpayers' rights. And this inquiry is exactly the same whether the students are children or adults.

6. Some have argued that the GI Bill, like government funds, is also bargained-for compensation, in a sense part of the soldiers' salary, but this isn't

“unearned” school choice funds. Again, both involve the “government . . . mak[ing] us pay taxes” that are then indirectly “used for religious indoctrination in faiths we may not share.” Whether the taxes flow as a result of a quid pro quo for services (“We’ll pay your salary if you work for us”) or as a result of a long-term investment in future services (“We’ll pay for your education because we think this will make you a more productive member of society”), the money still indirectly flows to religion.

But even if I’m wrong as to one or another of these examples, my general argument requires only that at least one of the examples work. If any of the examples involves the same sort of indirect money flow to religion as does school choice, then school choice should be just as constitutional as the program involved in that example.

2. *Equal Treatment*

The no-money-flow theory seems unappealing in most of these examples for a simple reason: Equality rings truer to our notions of the government’s proper role with regard to religion than does discrimination. The Constitution bars the “establishment of religion,” and treating everyone the same without regard to religion is hard to see as “establishing” anything—except equality.

I believe that government preferences for religion, whether in the form of special benefits going to one religion or to all religions, or government speech endorsing one religion or all religions, are generally unconstitutional. But equal treatment of religious and nonreligious people and institutions is perfectly fine, and such equal treatment maintains the separation of church and state by keeping the government scrupulously separate from people’s decisions about religion: The government facilitates a particular sort of behavior (whether it be university education, charitable giving, or K-12 education) without any concern about whether the behavior is religious or not. To borrow a phrase from Justice O’Connor, the government is not in any way “mak[ing] adherence to a religion relevant to a person’s standing in the political community.”⁷

historically accurate. The Bill was enacted as the Servicemen’s Readjustment Act of 1944, and thus wasn’t part of the originally promised salary for most World War II veterans. See 38 U.S.C. § 101 hist. note prec. (1998).

7. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring in the judgment); see also *Board of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part and concurring in the judgment); *Lee*, 505 U.S. at 606 (Blackmun, J., concurring); *id.* at 626 (Souter, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 626 (1989) (O’Connor, J.,

Equal treatment thus fits most people's intuitive responses to the first three hypotheticals I gave above. It's consistent with the notion of separation of church and state, a concept that, properly understood, is a sound restatement of the obligation not to "establish" religion by giving it any special status. It fits the constitutional text. As I will explain in Part C.1, it isn't contradicted by any evidence we have of original intent. As I will explain in Part E, it's consistent with basic Free Speech Clause and Free Exercise Clause principles.

It also makes moral sense, because it fits with the generally accepted notion that the government may not discriminate against people because of their religious affiliation (or lack of it). People who want to send their children to religious schools are no less worthy than people who want to send their children to private secular schools or government-run schools. The religious schools, like the other schools, are providing the socially valuable service of educating children, and are generally doing it no worse than the government-run schools.

The religious schools do teach a religious value system—just as secular schools teach a secular value system. There's nothing wrong from a constitutional perspective with either sort of value system, and there's no reason why the government is obligated to discriminate against one or the other system, and thus against the parents who choose to teach their children one or the other system. Just as we wouldn't tolerate discrimination against atheistic schools, or discrimination against secular schools, so we shouldn't assume that the Constitution requires discrimination against religious schools.

As I mentioned above, I oppose preference for religion as much as I do discrimination against religion. The government may neither give special preferences to religious schools nor teach a religion itself by adopting a religious curriculum or school prayers, because that *would* be governmental discrimination in favor of religion generally or even some religions in particular.⁸ But the government giving parents funds that they can

concurring in part and concurring in the judgment); *Texas Monthly, Inc.*, 489 U.S. at 9 n.1 (plurality).

8. I recognize that this sometimes puts the government in a bind: The government can't teach religion in its schools, since that would be discrimination in favor of religion (and probably in favor of one religion or one set of religions); and it can't completely exclude religion from its schools, since that would be discrimination against religion. In theory, the government should expose children both to religious and nonreligious answers to various contested questions, with no preference for either, much as we hope that a comparative philosophy class or an art history class would expose students to a

then use to teach their children whatever values the parents choose is not preference for religion—it's equal treatment without regard to religion.

We see echoes of this egalitarian understanding even among those who most prominently espoused variants of the no-money-flow theory. Justice Brennan, for instance, captured this view well when he said, in striking down a law that banned clergy from public office, that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." Such "discriminat[ion] between religion and nonreligion," Brennan (joined by Justice Marshall) wrote, "manifests patent hostility toward, not neutrality respecting, religion." "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."⁹

The Constitution, if this view is taken seriously, requires—and certainly allows—equal treatment of religion, not discrimination against it. And evenhanded school choice programs that let parents choose any school, government-run, private secular, or religious, are thus constitutional.

B. THE DEFENSE OF DISCRIMINATION AGAINST RELIGION— THREE EQUALITY ARGUMENTS

Once the no-money-flow argument is rejected—as it must be—how do supporters of discrimination against religious schools defend their position? Let me begin with three arguments that at least speak the language of equality.

1. *The Predominant Effect Argument*

Equality is well and good, some say, and money flow as such isn't the problem, but aren't school choice programs unequal in *effect*? Most of their funds, the argument goes, end up being spent at religious schools. The programs, even if facially neutral,

broad range of ideas and works, religious and secular. But in practice, government-run institutions invariably end up either tilting too much in favor of religion or too much against it. This is yet another advantage of a school choice system, because a general government-funded choice system *can* treat religions and nonreligious belief systems evenhandedly, by letting parents choose the value system that their children will be taught, rather than having the government make that choice.

9. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment); *see also id.* at 636, 639.

thus have a disparate impact, which should doom them even under an equality theory.

As it happens, though, only 9% of American K-12 students go to religious schools. The claim that "most school choice funds will end up flowing to religious schools" is plausible only if one puts on blinders that exclude the number one beneficiary of school spending: government-run schools, which teach 89% out of the remaining 91%.¹⁰

Of course, it's easy to put on these blinders, because it's always easy to view the status quo—and the disparate impacts that it contains—as somehow necessarily right, and to view shifts from the status quo as inherently suspect. But the Constitution doesn't command such a narrow view of the world. Right now, all standard K-12 spending goes to secular education; this itself is a powerful "disparate impact" favoring secular uses and disfavoring religious uses. School choice will *diminish* this disparate impact.

For the reasons the Court has given in the Equal Protection Clause context,¹¹ I think disparate impact inquiries are flawed, and shouldn't be part of the constitutional analysis. But those who do care about disparate impact should look to the impact of educational spending generally—not of the small minority of educational spending that would go to private schools under school choice—and recognize that school choice causes less disparate impact based on religiosity than does the current system.

2. *The Disparate Impact on Various Religions Argument*

What about the possible disparate impact on *particular religions*? Not all religions, the argument runs, can equally benefit from school choice programs. Some small religious groups—for instance, the only Jewish family in a small town—won't be large enough to set up their own schools; and because of their religious beliefs, they won't be able to take advantage of the other religious schools that spring up. Even if the schools don't overtly require the students to profess a certain faith (many Catholic

10. See NATIONAL CTR. FOR EDUC. STATS., 1997 DIGEST OF EDUCATION STATISTICS tbls. 40 & 59 (1998), available at (visited Feb. 12, 1999) <<http://nces.ed.gov/pubs/digest97/d97t040.html>> and <<http://nces.ed.gov/pubs/digest97/d97t059.html>>. The numbers I used were the ones for Fall 1993 (government-run schools, table 40) and 1993-94 (private schools, table 59). During that time, there were 43,464,916 children enrolled in government-run schools, 768,451 in private secular schools, and 4,202,194 in private religious schools. See *id.*

11. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

schools, for instance, happily accept non-Catholic students), we can understand that many groups can't really derive a benefit from schools which teach a curriculum with which the groups disagree in an environment that's built around principles with which they disagree.¹²

But again, such a disparate impact is even more present under the current system. People of various religious groups have beliefs that keep them from taking advantage of the government-run schools, either because of the schools' teachings or because of the schools' general policies on student behavior, modesty, and so on. Just as some secular parents might feel unable to send their children to a school which teaches a pervasively Christian curriculum, so some Christian parents might feel unable to send their children to a school which teaches a pervasively secular curriculum.¹³

Many religious groups, especially majority groups, can tolerate government-run schools; under the current system, they are the big winners. A few other religious groups, such as Catholics, are big enough and prosperous enough that they can set up their own schools; under the current system, they make do. But smaller groups whose religious beliefs keep them from using the government-run schools—including groups that are big enough that they could set up a school of their own if they could participate in a school choice program, but are too small or poor to set it up without such a program—are the losers. Plenty of disparate impact here.

School choice will lessen this disparate impact, because it will broaden the choices available to everyone. Today, many poor parents' only choice is a government-run school (unless

12. The best articulation of this very argument (and several others) is Alan Brownstein's very fine (though I think ultimately mistaken in certain ways) *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. (forthcoming 1999) (manuscript at 31, on file with the Notre Dame Journal of Law, Ethics & Public Policy).

13. See, e.g., Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 585, 591, 595 (1993) (discussing some such objections in *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987)); see also George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 708-09 (1993) (discussing other such objections); George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 867-69 (1988) (likewise); Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 B.Y.U. L. REV. 569, 578, 581 (likewise); Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 181-82, 213 (1996) (likewise); David Bernstein, *Why Johnny Can't Pray*, REASON, Feb. 1992, at 56.

they belong to a denomination rich enough to help them). Under school choice, the poor parents could choose between government-run schools and many private ones, secular or religious; given this choice, it's more likely that they'll find at least one of these schools to be suitable. True, some poor parents will still be unable to find a school that fits their particular religious beliefs—but under the current system, many more parents are in this boat.

3. *The Closed Government-Run School Argument*

Some hypothesize the following scenario, which also focuses on supposed disparate impact on minority-religion children: In a small community, 90% of the students are of one denomination; school choice leads their parents to pull all of them out of the government-run school and send them to a religious school; the government-run school closes because it lacks enough students; and minority-religion students are now forced by circumstances to go to the religious school. That, the argument goes, would be an Establishment Clause violation.

But it seems odd to let the fate of school choice throughout the whole nation—in many areas of which there is a great diversity of denominations—to be driven by such a rare and easily remediable hypothetical.¹⁴ If one is really concerned about this particular problem, there are plenty of solutions. The school choice program can, for instance, require that school boards keep at least one secular school open in every locality. The program can even be limited so that at most, say, 80% of the funds go to private school students, thus requiring that at least 20% of the money goes to the government-run school (if there's more demand than that for private schools, the lucky 80% could be chosen randomly). There are many sound solutions to this problem, if one thinks it's likely to be a problem; and there's no reason to let the unusual possibility described in the hypothetical drive the broader debate.

14. I say rare for three reasons: First, many areas of the country are quite religiously heterogeneous. Second, in the areas that are most religiously homogeneous, the majority is unlikely to abandon the government-run schools because it has generally structured them in a way that it likes; the schools are constitutionally barred from explicitly teaching religion, but they probably implement a curriculum and disciplinary standards that are largely consistent with the dominant group's views. Third, recall that government-run schools now have 89% of the market; it seems quite unlikely that they'll plummet from 89% to 10% simply because of school choice, unless they are very bad indeed. See *supra* note 10.

C. THE DEFENSE OF DISCRIMINATION AGAINST RELIGION—SEVEN OTHER ARGUMENTS

1. *The Original Intent Argument*

Going beyond arguments that at least use the language of equality, we turn first to original intent. Wasn't the Establishment Clause intended to prevent any government funds from flowing, directly or indirectly, to religious institutions, even if that means discriminating against religion? Wouldn't evenhanded school choice programs set "Thomas Jefferson and James Madison spinning in their graves,"¹⁵ as the president of People for the American Way opined?

Well, no. Framing-era criticisms of religious establishment were levied at preferential aid to religion, not at neutral individual choice programs. For instance, James Madison's *Remonstrance Against Religious Assessments* (1786)—often cited by school choice critics—was actually aimed at a preference scheme called the "Bill Establishing a Provision for Teachers of the Christian Religion," which Madison said "violate[d] that equality which ought to be the basis of every law."¹⁶ The relatively minimal late-1700s governments gave the Framers no occasion to think about government funds flowing through private choices under genuinely evenhanded benefit programs to religious institutions.¹⁷

If there were evidence that the Framers meant to enshrine the no-money-flow theory—and thus discrimination against religion—as a constitutional command, with all the harsh consequences (described in Part A.1) that this would entail, I'm originalist enough that I would take this evidence seriously. But I know of no such evidence, and my sense of the Framers' worldview is that they did not think the government was required to discriminate against religion.¹⁸

15. *Statement by People for the American Way President on Milwaukee School Plan*, U.S. NEWswire, June 10, 1998, at 1, available in LEXIS, NEWS Library, USNWR File.

16. *Everson v. Board of Educ.*, 330 U.S. 1, 66 (1948).

17. Compare *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852-63 (1995) (Thomas, J., concurring) (arguing that the original meaning of the Establishment Clause at least allowed evenhanded inclusion of religious groups in generally available government programs) with *id.* at 868-71 & nn.1-2 (Souter, J., dissenting) (taking the opposite view). Nor am I aware of any evidence that the Ratifiers of the Fourteenth Amendment, by which the Establishment Clause has been made applicable to the states, intended to require discrimination against religion.

18. Cf., e.g., Northwest Ordinance of 1787, art. III ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."); see also GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987).

2. *The Total Funding Argument*

What about the fact that school choice programs make it possible for virtually all of a religious school's funds to come from the government? Doesn't such "[t]otal government subsidy of churches or parochial schools undoubtedly . . . violate the establishment clause"?¹⁹ This, one might argue, distinguishes school choice programs from the GI Bill, under which only some of a university's operating budget—even shortly after a war, when many of the students are returning veterans—comes from the government, and from the charitable tax deduction, under which only up to 40% or so of the institution's money in effect flows from the subsidy created by the tax deduction.

This, though, is a distinction without a difference, because it wrongly focuses on *what fraction* of an institution's funds indirectly flows from the government, rather than on the important point, which is *how* the money flows.

Consider a church or a religious school that is near a military base. All or virtually all of its income may well come from military personnel's salaries, which in turn flow from taxpayer funds. Would we be concerned that there's a "total government subsidy of [the] church[] or parochial school[]"? Would we insist that the soldiers be barred from paying any donations or tuition out of their salaries? No: We'd think that any such limitation on the soldiers' choice of what to do with their salaries would be improper (and perhaps unconstitutional) discrimination against religious choices, because the choice to use tax-derived money to "subsid[ize]" religion is the soldier's own choice, entirely uninfluenced by any governmental preference for religion.²⁰

Or imagine that American politics returns to the era of big spending, and Congress dramatically increases the Pell grant program to the point that all college students in the nation can take advantage of it to cover pretty much their entire tuitions. Does it suddenly become unconstitutional for these grants to be used at

19. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1005 (1997). Note that many religious schools in fact will not get all or almost all of their funds from school choice programs. Some such schools may charge more than the choice funds will cover; some may raise funds from parents or parishioners to supplement the choice funds; and some school choice programs may give funds only to some children (for instance, poor ones), which means that at most schools many children will be privately funded.

20. The same would be equally true of income other than salaries; consider a church whose parishioners are overwhelmingly poor retirees, who donate money out of their social security payments.

Notre Dame or Yeshiva University, simply because Congress decided to be so generous that all students can now use them?

An implausible example, some might say; the U.S. will never so completely socialize payment for higher education. But this is exactly what has happened with K-12 education: K-12 education is one of the few areas of American life in which the government has decided to almost entirely socialize the spending for some activity.

Today, the government-run schools that teach 89% of all K-12 students²¹ are "total[ly] subsid[ized]," quite directly, by government funds. Under a school choice program, somewhat more of the schools (not 100%, since some private schools, including some religious schools, may charge extra money on top of the school choice funds) will be almost "total[ly] subsid[ized]" by government funds routed to the school by parents' choices. This "total subsidy," though, would simply be an outgrowth of the laudable goal of funding the teaching of all children, including those whose parents can't pay for it themselves. So long as the program treats children alike without regard to the religiosity of the school to which they go, it's no more "establishment" than the broadened Pell grant program or the donations by soldiers would be.

Concern about how much of a program's funding comes from tax money could only make sense if we were talking about a minimalist government. If the government didn't subsidize education at all, it would indeed be unconstitutional for it to nonetheless fund almost all of the costs of religious education, because that would be discrimination in favor of religion. But when the government chooses to play a huge role in some endeavor—for instance, when, as in the military base example, the government becomes the dominant local employer, or in the broadened Pell grant example, the government decides to fund all college education—then there's nothing improper about the individual recipients of all this evenhanded government aid voluntarily routing some of it to religious uses.

3. *The Slippery Slope Argument*

But wouldn't the equality theory set us on a slippery slope? If taken seriously, wouldn't it allow government funding of religion that's clearly inappropriate? Wouldn't it let the government engage even in direct aid to the religious institution itself, perhaps even funding the building of churches? Or, as one

21. See *supra* note 10.

reader of a draft of this paper suggested, wouldn't it allow "vouchers" that could be donated to a church for "purely religious rituals"?

The intuitive appeal of this argument, though, rests on the fact that nowadays the government *does not* evenhandedly entirely fund all charitable contributions or the construction of all buildings, and that it's hard to imagine the government so broadly socializing charity or the construction business. But if the government does choose to evenhandedly fund building construction—for instance, as part of a disaster relief program—then I see nothing wrong with the government treating all applications equally, whether or not they come from churches.

To give a real example, following the Oklahoma City Federal Building bombing, the Federal Emergency Management Agency at first refused to give generally available rebuilding funds to a neighboring church that was damaged during the rescue efforts; FEMA only relented after pressure from Oklahoma's congressional delegation.²² Which approach was more just: FEMA's initial discrimination against religion, or the equal treatment on which the government finally settled?²³

Likewise, if the government chose to give all Americans \$100 vouchers that they could then donate to a charitable institution of their choice, I would see no problem with them using this voucher to fund a religious institution. In fact, this is very close to what our current tax deduction system does: If I'm in a combined state and federal 45% tax bracket, then if I donate \$1000 to a synagogue, even for "purely religious rituals," the government will effectively pick up \$450 of this tab. Is this unconstitu-

22. Cf. Laura Vozzella, *Aftermath Gives New Confidence to Oklahomans*, JOURNAL-REC. (Oklahoma City), Apr. 19, 1996 ("The rebuilding effort at First United Methodist Church has been slowed by church-and-state red tape. The church, one of at least four damaged in the [Oklahoma City Federal Building] bombing . . . [sought] \$12,000 from the Federal Emergency Management Agency to cover uninsured damages caused after the blast, when rescuers placed bloody bodies on the carpeted church floor and pitched tents in its newly resurfaced parking lot. FEMA refused by saying the aid would violate the constitutional separation of church and state. The agency later came around under some pressure from Oklahoma's congressional delegation.").

23. Similarly, contrary to some of the Court's 1970s cases, I see nothing wrong with the government generally funding buildings at all universities, even religious ones, so long as the program is equally open to universities without regard to their religiosity. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971). But even those who disagree with me on this score might accept that programs in which the money is routed through the free choices of the beneficiaries—such as my perennial examples of the GI Bill, Pell grants, welfare payments, government employee salaries, and charitable exemptions—need not discriminate against religious institutions.

tional? No, nor would it be unconstitutional if the government decided to turn the charitable exemption into a straight one-for-one tax credit.²⁴

Ultimately, it's quite unlikely that American government will fund all charitable contributions or all building construction. Our government is big, but it's not that big. One can certainly oppose such programs on policy grounds, whether or not they include religious institutions. But if the government shifts to such a massive subsidy, there seems to me to be nothing wrong in its including religious institutions, treating them no better and no worse than anyone else.

4. *Quid Pro Quo*

Some defend discrimination against religion by finding an implicit "quid pro quo" in the Religion Clauses: The government indeed must discriminate against religion in some ways under the Establishment Clause, the theory goes, because it must (or may) favor religion in other ways under the Free Exercise Clause.²⁵

The trouble with this claim is three-fold. First, the special benefits that religion supposedly preferentially gets are actually pretty minor. Tax exemptions, for instance, are neutrally available to all schools, religious or not; preferential tax exemptions for religion are generally unconstitutional.²⁶ Religious institutions and individuals may get a few constitutionally assured exemptions, but—especially following *Employment Division v. Smith*,²⁷ though also even before *Smith*—only a few; and they may

24. Some might even argue that a charitable tax credit is fairer than the charitable tax exemption, because it at least provides the same effective subsidy for all taxpayers; the exemption provides a greater effective subsidy for the favorite charities of those in higher tax brackets.

25. See, e.g., Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 247-48 n.15 (1999); Derek H. Davis, *Equal Treatment: A Christian Separationist Perspective*, in EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 157 (Stephen V. Monsma & J. Christopher Soper eds., 1998).

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

27. 494 U.S. 872 (1990). Even before *Smith*, the Court's Free Exercise Clause jurisprudence provided very few exemptions for religious objectors. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (calling strict scrutiny in pre-*Smith* Free Exercise Clause cases "strict in theory but feeble in fact"); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (calling it "strict in theory, but ever-so-gentle in fact"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110, 1127 (1990) (saying that "[t]he 'compelling interest' standard is a misnomer" because the

get a few more preferential statutory exemptions, but even those are distinctly limited by *Texas Monthly v. Bullock* and other cases.²⁸ In fact, courts have interpreted some protections for religious objectors (including, most significantly, Title VII's religious accommodation provision) to cover all conscientious objectors, including secular ones, precisely to avoid creating a preference for religion.²⁹ Can the minor special benefits given to religion justify massive, multi-billion-dollar discrimination against religion in school funding?

Second, this comparison highlights a more basic problem with the "quid pro quo" approach: It provides no guideline for deciding which kinds of discrimination against religion are required and which are not. Quid pro quo theorists may argue that the supposed benefit to religion flowing from the Free Exercise Clause only requires discrimination against religion in K-12 school choice—but if we accept this theory, how can we know that it won't also require discrimination against religious university students in Pell grants and GI Bill funds? How can we know that it won't require the government to discriminatorily exclude

actual test the Court has applied is more lenient); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413-37 (1992) (examining the "rise and fall of the compelling interest test" in Free Exercise Clause cases).

28. See, e.g., *Board of Educ. v. Grumet*, 512 U.S. 687, 715 (1994); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

29. See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970) (Selective Service Act). As to Title VII, see, for example, *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 137 n.4 (3rd Cir. 1986) ("The breadth of the 'exemption' afforded by Title VII is underscored by the fact that in defining religion, the EEOC has used the same broad definition as the Selective Service employs for conscientious objector purposes."); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 n.12 (7th Cir. 1981) (same); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) ("We believe the proper test to be applied to the determination of what is 'religious' under § 2000e(j) can be derived from the Supreme Court decisions in [*Welsh*] and [*Seeger*], i.e., (1) is the 'belief' for which protection is sought 'religious' in person's own scheme of things, and (2) is it 'sincerely held.'"); *Ali v. Southeast Neighborhood House*, 519 F. Supp. 489, 490 (D.D.C. 1981) ("Sincere beliefs, meaningful to the believer, need not be confined in either source or content to traditional or parochial concepts of religion. [*Welsh*]. See also [*Seeger*] for the definition of 'religious training and belief' as applied to a conscientious objector claim, which definition is no less appropriate here."); *Wondzell v. Alaska Wood Prods., Inc.*, 583 P.2d 860, 866 n.12 (Alaska 1978) ("In order to avoid the danger of unconstitutionality we would interpret [the state statute] to accord the same privileges to all sincere conscientious beliefs, whether or not they are accompanied by a belief in a supreme being."); *Kolodziej v. Smith*, 425 Mass. 518, 522 (1997). But see *Seshadri v. Kasraian*, 130 F.3d 798, 800 (7th Cir. 1997) (Posner, J.) (concluding that Title VII doesn't apply when "the plaintiff's belief, however deep-seated, is not religious").

religious institutions from evenhanded charitable tax exemptions? The “quid pro quo” argument gives us no way of deciding what amount of discrimination against religion is right and what amount ends up being too much.

But, third, and most important, “religion” isn’t one person or entity that we can expect to pay for the benefits it gets. Some groups—for instance, the Amish or Seventh-Day Adventists—might indeed get some religion-specific benefits in the form of religious exemptions, but how does that justify discriminating against other religions (say, Catholics or Southern Baptists) that get no such religion-specific benefits? Taking “quid” from the Catholics to compensate for the “quo” given the Amish isn’t even rough justice; it’s no justice at all.

5. *K-12 Education as Government Speech*

Kathleen Sullivan argues that the government must discriminate against religious schools in school choice programs because “educational curriculum in K-12”—including the curriculum in private schools to which government funds flow through an evenhanded school choice program—“is government speech.”³⁰ Because of this, her argument goes, “there is every danger that the forced inclusion of religious speakers in the mix will cause the religious message to be attributed to the state and to its taxpayers”; the government must therefore refrain from including religious schools in its benefit programs just as it must refrain from “official endorsement of religion” in its own speech.³¹

But this theory rests on a factual premise that just isn’t so. There’s no reason to think that reasonable people will indeed assume the government is endorsing the message of religious schools: People know that the government doesn’t necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage.

30. Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 256-57 (1996). At times, Dean Sullivan’s argument sounds like a conventional “no money flow” argument, for instance when she suggests that “[u]nder a voucher scheme that extended to parochial school education, some taxpayers would inevitably be forced to subsidize religious messages with which they did not agree,” *id.* at 256; her article does not, however, explain why this same argument wouldn’t doom the GI Bill or charitable tax exemptions. Still, her more focused “public education is government speech” argument is analytically different from the standard “no money flow” approach.

31. *Id.* at 256-57.

The government doesn't endorse Catholicism by helping GIs go to Notre Dame, or Judaism by letting people deduct contributions to their synagogue (among a wide range of other charitable contributions) from their taxes. If you tell a reasonable person, "Here's a Catholic school, and it teaches Catholic values and theology; many of its students are here under a school voucher program, through which parents get funds to send their kids to any accredited school they wish, whether it's secular, atheist, Jewish, Moslem, or Catholic," I see no reason why such a person would say "Aha! The government must be endorsing Catholicism," and no likelihood that the person would in fact say this.³² As a descriptive matter, I don't believe that most people would draw such an inference; and as a normative matter, I don't see how it can be "reasonable" for a person to draw such an inference. How can the government be seen as endorsing one viewpoint when it evenhandedly lets parents choose schools that fund a vast range of viewpoints, some of which may be diametrically opposed to the viewpoint that's supposedly endorsed?

Dean Sullivan tries to support her thesis by pointing out that the government may not "erect a Latin cross on the capitol roof" or allow "a private civic group [to] place a crèche on a courthouse staircase";³³ this, though, merely reflects the fact that the government must not give *preference* to religious messages. Displaying a sectarian symbol this way, or allowing a group special access to a place where other groups are denied access, would be such a preference.³⁴

In fact, the government might be allowed to include religious components even in its own speech, so long as it does so on a genuinely evenhanded basis: For instance, a government-run museum should be able to include religiously themed paintings in its exhibitions, so long as it's choosing those paintings because of their artistic quality or historical importance, not because of

32. A program that's open only to accredited schools, or only to schools that (for instance) teach at least reading, writing, and arithmetic, can be said to endorse reading, writing, arithmetic, or the requirements involved in accreditation (*e.g.*, success on standardized tests); but it wouldn't endorse religiosity, which forms no part of the criteria under which schools are included.

33. Sullivan, *supra* note 30, at 251, 256.

34. The crèche case to which Dean Sullivan seems to be alluding, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), involved such preferential access. Cf. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding a private group's right to erect a cross in a generally open public forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (upholding a private group's right to use school classrooms for after-school religious speech, when those classrooms were open to other groups).

their religiosity. But even if I'm wrong on this score, and the government must keep its own speech free from all religious components, Dean Sullivan's examples say nothing about genuinely evenhanded programs under which the government facilitates the speech of others.

6. *Government Funds Flowing to Religiously Discriminatory Programs*

Some suggest that government funds may not flow, even through an evenhanded program, to an institution that discriminates based on religion in selecting employees. Because the government may not itself discriminate based on religion itself, the argument goes, government also may not let government money flow to religiously discriminatory institutions.

This argument, though, is hardly limited to K-12 schools. It would apply to students using GI Bill funds at religious universities that consider religion as a factor in hiring their faculty (something Title VII lets religious universities do³⁵). It would apply to a patient using Medicare at a Catholic hospital that gives preference to nuns for nurse positions. It would likewise apply to a government employee donating funds to a church and to a taxpayer claiming a deduction for such donations. In *all* these situations, government money indirectly flows to religious institutions which "reserv[e] jobs funded by state resources for persons of their own faith."³⁶ Is the government really constitutionally obligated to exclude from all these programs all institutions that (perfectly lawfully) discriminate based on religion in hiring?

The answer to this question must be "no": While the *government* generally ought not discriminate based on religion or religiosity, it's quite proper for religious institutions to do this. We're untroubled by the Catholic University of America preferring Catholic faculty members, because that's an important way in which the University ensures that it remains a center for the

35. See, e.g., 42 U.S.C. §§ 2000e-1(a), 2000e-2(a); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986).

36. Brownstein, *supra* note 25, at 283; see also Alan E. Brownstein, *Constitutional Questions About Charitable Choice, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS* 235 (Derek Davis & Barry Hankins eds., 1999) ("Allowing churches to discriminate on the basis of religion in hiring employees with state funds impermissibly advances religion because it provides religious organizations coercive economic power that would otherwise be unavailable to them were it not for the state's assistance."); Brownstein, *supra* note 12 (manuscript at 17-18, on file with the *Notre Dame Journal of Law, Ethics & Public Policy*) (applying this argument specifically to school choice plans).

spread of Catholic thinking; if someone is refused a job there because he's not Catholic, Title VII properly concludes that his legal rights have not been violated. Likewise for Catholic hospitals preferring nuns as nurses, something that helps the nuns fulfill their spiritual calling. And if a veteran or a Pell grant recipient chooses to use his stipend at Catholic University—perhaps precisely because he wants to be taught Catholic thinking by Catholic faculty—the government has no obligation to block that choice. The same, it seems to me, applies to school choice funds.

7. *Harm to Government-Run Schools*

Finally, some argue, wouldn't school choice hurt government-run schools, for instance by depriving them of money or by skimming off the best students?

This, though, is a policy objection, not a constitutional one. The Constitution doesn't have a You May Not Hurt Government-Run Schools Clause; it has an Establishment Clause.³⁷ Even if school choice (whether it includes religious schools or is limited to secular schools) did somehow hurt government-run schools, this wouldn't make it unconstitutional.

As importantly, we don't really know how school choice will affect government-run schools. Will it weaken them, or will it force them to improve by making them compete for students?³⁸ We will only learn the answer to this question through experimentation. The Establishment Clause question is whether such experimentation is even permissible; I believe that the answer is "yes."

But while we are on these policy objections, let me briefly make two policy responses. First, as to "skimming off the best students": Even if school choice does lead to the best students leaving government-run schools (which is far from certain³⁹),

37. State constitutions do sometimes include clauses that guarantee a public education, but a school choice program doesn't contravene such mandates: First, school choice does provide students with a publicly funded education, whether or not the education takes place in government schools; second, even if the clauses require the government to operate government-run schools, it hardly follows that they bar the government from supporting both government-run and privately-run schools.

38. See, e.g., Nina Shokraii Rees, *Public School Benefits of Private School Vouchers*, POL'Y REV., Jan./Feb. 1999, at 16.

39. Private schools take problem students as well as good ones, and often give the problem students a better education than the students would get at government-run schools. See, e.g., Jonathan Fox, *Sending Public School Students to Private Schools*, POL'Y REV., Jan./Feb. 1999, at 25 (discussing existing programs through which private schools teach hard-to-educate disabled children); Nina H. Shokraii, *Why Catholic Schools Spell Success for America's Inner-City Children*,

and thus “hurting” the schools, the “skimming” objection gets the analysis exactly backward. Students shouldn’t be means to the end of improving the government schools—government schools should be a means to the end of improving each student.

Good students aren’t just tools that are available for the government to use in order to improve the quality of its schools (or even to improve the education of other, not-so-good students). It’s wrong to deprive the good students of educational choices so they can remain trapped in government schools for the government schools’ benefit. Even if there are good arguments for not helping parents who choose to send their kids to private schools, “we need your kid at the government school to make the school better” is not among them.

Note also that the “skimming” objection could equally well be made against government-run magnet schools, charter schools, and all the other programs that many school choice opponents have proposed as alternatives to school choice. Of course, the objection there is unsound: There’s nothing wrong with a magnet school providing a better education for the good students, even if that means that other schools will be somehow deprived of those students. But exactly the same point applies to private schools.⁴⁰

Second, as to school choice supposedly draining money from the government-run schools: Again, this may not in fact

HERITAGE FOUND. ROE BACKGROUNDER NO. 1128, June 30, 1997, *available at* (visited Apr. 18, 1999) <<http://www.heritage.org/library/categories/education/bg1128.html>>. Moreover, some school choice plans provide for random selection (though I don’t believe such a criterion is constitutionally required).

40. For a remarkable example of this, see Dave McNeely, *Vouchers Won’t Solve Problems in Education*, AUSTIN AM.-STATESMAN, July 23, 1996, at A7. The article sets forth (seemingly with approval) the argument that

[V]ouchers that use tax dollars to allow students to pay tuition at private schools in essence allow the private schools to skim the cream off the public school system.

....

As the haves and the best and brightest have-nots exit the public school system, those left behind do not have nearly as much opportunity to be exposed to the smarter kids. And since students learn almost as much from each other as they do from their teachers, this is unfair.

Id. This is the classic trap-the-good-students-to-help-the-bad-ones argument.

But then the article describes, again favorably, the argument that “a far better way to bring competition and market forces to work in public education is charter schools, not vouchers.” *Id.* Nowhere does the article acknowledge that charter schools are subject to the same “skimming” critique that the article saw as such a strong argument against broad school choice.

happen,⁴¹ but even if it does, where did the government-run schools get this extra money that school choice would supposedly drain?

Under our educational system, all children are entitled to have their educations paid for; the government commits on average \$6000/year to this end.⁴² Without school choice, when parents send a child to private school they forfeit this money, which means they must have found the government schools so unsatisfactory that they are willing to entirely throw away the subsidy. Each time a child leaves the government school system, the state treasury receives a windfall, because it has one less child to educate (while still having the same tax revenues coming in).

The supposed "loss" to the government-run schools comes out of this massive windfall. Under school choice, parents who leave the government schools would no longer have to entirely surrender the education funds that their child would otherwise have gotten; part of the funds would travel with the child to the school the parents choose. True, the treasury would no longer be able to make money off the parents' dissatisfaction with the government schools, so in that sense the public fisc (and the schools funded out of it) would be "hurt" by school choice. But this "harm" would just be an outcome of the fact that private school parents would no longer have to pay twice—once for the government-run education that they found unsatisfactory and once for the privately run education they are buying in its stead.

41. Many school choice programs provide lower support for choice students than the cost of the education at government schools; therefore, students who leave government schools under those programs will actually *save* the government money, while students who had left government schools earlier but who now get choice funds will cost the government money. For instance, if the cost of government school education is \$6000/year, the choice program pays \$4000/year, 10% of all students were in private school before the choice program, and 30% of all students will be in private school after the choice program is implemented, the government will lose no money (since $\$6000 \times 90\% = \$6000 \times 70\% + \$4000 \times 30\%$). Likewise, if a school choice program has \$5000/year choice payments but is open only to poor students, only 3% of all poor students were in private school before the choice program is implemented, and 20% of all poor students will be in private school after the choice program is implemented, the government will save money (since $\$6000 \times 97\% > \$6000 \times 80\% + \$5000 \times 20\%$). Of course, some other school choice programs—for instance, ones that pay for a voucher that is equal to the cost of the government school education—will end up costing extra money for the government; I only point out that if revenue-neutrality were the only concern, many school choice programs, especially ones aimed at poor kids, could pass muster.

42. See NATIONAL CTR. FOR EDUC. STATS., *supra* note 10, at tbl. 169, available at (visited Apr. 18, 1999) <<http://nces.ed.gov/pubs/digest97/d97t169.html>> (current expenditure per enrolled pupil, 1996-97, estimated).

Surely eliminating this double payment would create a fairer system, even if the system would be somewhat more expensive because it gives away some of the old system's unearned windfall.

Finally, consider a hypothetical: Let's imagine that the defenders of government schools speak so eloquently that all private school parents see the light and immediately transfer their children back to the government-run system. This would impose a *greater* burden on the public treasury than a school choice program would impose (since school choice programs usually spend less on private school students than is spent on students in government-run schools).

Does this extra burden mean that the parents are somehow greedy people who would be "harming the government schools" by their actions, and who should therefore be discouraged from returning to the government schools? No: Parents who switch back to a government school are simply reclaiming the benefit that the government has promised to provide for their children. The same is true for school choice programs, which simply give back to the parents who had fled the government system the benefit that they originally had.

D. HARM TO RELIGION

Finally, I turn to an argument that focuses not on alleged harm to taxpayers or to religious minorities, but rather on potential harm to religious institutions themselves: The argument that school choice is unconstitutional because it might hurt religious schools by bringing government oversight and regulation and thus destroying religious schools' independence. True, the argument runs, schools *could* just avoid the strings by rejecting the money; but when put to the choice of (1) taking the government subsidy and compromising their religious objections to the strings or (2) sticking by their beliefs but losing the subsidy, they may feel pressure to choose option two. And the possibility of such pressure, the argument goes, isn't just a policy argument against school choice, but actually makes school choice violate the Establishment Clause.

To begin with, though, note that this argument too is equally applicable to all neutral programs, not just ones involving K-12 schools. If you take it seriously, you'd have to say that the GI Bill and the charitable tax deduction are also unconstitutional, because they could also come with strings that pressure recipients to compromise their religious beliefs.⁴³ Exhibit A here

43. The benefits that universities get from the charitable tax exemption are valuable enough that the threat of withdrawing the exemption can cause

would be *Bob Jones University v. United States*,⁴⁴ in which the government successfully pressured Goldsboro Christian Schools into abandoning its religiously motivated racially discriminatory admissions policy.⁴⁵

But more importantly, this focus on the pressure caused by school choice programs blithely ignores the greater pressure exerted by the status quo. After all, just as religious schools might conceivably object on religious grounds to some strings that come with school choice funds, so today many religious parents object on religious grounds to many aspects of the curriculum and environment in government-run public schools. The offer of a free education in a government-run school puts these parents to the choice of (1) taking this government subsidy and compromising their religious objections to the curriculum or environment or (2) sticking by their beliefs but losing the subsidy—and of course many of these parents feel pressure to choose option two.

So again the supposed constitutional defect—here, the risk of government pressure that leads some to abandon their religious obligations—is as present under the existing system as under a school choice system. In fact, it may be greater under the existing system. School choice programs might come with a few strings, but a school choice system at least *can* take a mostly hands-off approach to the conduct of each private school, just as the tax deduction system attaches some strings to the charitable deduction, but not many. But the government obviously can't take such an approach to the conduct of government-run schools, and thus government-run schools necessarily impose a vast range of "strings" on their students: You must take classes that teach you this-and-such, and are structured in the following way; you must be around students who dress in ways you might think immodest (and thus spiritually harmful for you to look at), or use language you might think is blasphemous (and thus spiritually harmful for you to hear); and so on. This is inevitable for

tremendous pressure; the GI Bill benefits may be somewhat less, but they could still be plenty, especially immediately following a major war.

44. *Bob Jones Univ. v. United States*, 461 U.S. 574, 581 (1983).

45. Ralph Mawdsley, *Religious Educational Institutions: Limitations and Liabilities Under ADEA and Title VII*, 89 ED. L. REP. 19, 34 n.92 (1994). The other school involved in this litigation, Bob Jones University, apparently resisted the pressure, *id.*, but it may have earlier changed another of its policies—a ban on admission of unmarried blacks, which it believed was scripturally required—in response to an earlier threat of revocation of its tax exemption. See *Bob Jones Univ.*, 461 U.S. at 581; Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 51 & n.139 (1983).

any school that the government itself not only indirectly funds, but directly runs.

Government-imposed conditions that pressure people to compromise their religious beliefs should thus be *less* serious under a school choice system than they are today. At the very least, they would be no more serious.

E. THE CONSTITUTIONAL MANDATE OF EQUAL TREATMENT

If these arguments are correct, then equal treatment is at least constitutionally allowed. But I also believe equal treatment is constitutionally compelled: The government may not discriminate against people or institutions because of their religiosity. The government may choose to fund only government-run schools and not private ones, because such a distinction would be based on government control, not religiosity; but any choice programs that help secular private schools may not exclude religious ones.

To begin with, this view is supported by the Free Exercise Clause, under which, *Employment Division v. Smith* tells us, "The government may not . . . impose special disabilities on the basis of religious views or religious status."⁴⁶ "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."⁴⁷

The Court has usually said this when discussing prohibitions on conduct, but equality rules generally apply to government benefits as well as government prohibitions.⁴⁸ In fact, even in *McDaniel v. Paty*, where the Court dealt not with a ban on religious conduct but rather with eligibility for office, the Brennan/Marshall concurrence held that excluding ministers from office violated the Free Exercise Clause, because "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."⁴⁹

Likewise, the Court's Free Speech Clause cases suggest the government may not discriminate against private religious teaching and in favor of private secular teaching, even when the dis-

46. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

47. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

48. Consider, for instance, the Equal Protection Clause principles of equal treatment based on race and sex.

49. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment).

crimination involves distribution of benefits. *Widmar v. Vincent* held that the government may not deny college classrooms to religious meetings when it opens them to secular meetings.⁵⁰ *Lamb's Chapel v. Center Moriches Union Free School District* held the same as to K-12 classrooms.⁵¹ *Rosenberger v. Rector and Visitors of the University of Virginia* held the same as to reimbursement of expenses for college newspapers.⁵²

Religious speech is not some stepchild of constitutional law: It is fully protected by the Free Speech Clause, and once the government sets up a generally open subsidy program, it can't discriminate against religious speech in operating the program. And education is, of course, predominantly speech. Just as the Free Speech Clause would stop the government from banning religious schools,⁵³ so it prohibits a government that's willing to

50. 454 U.S. 263 (1981).

51. 508 U.S. 384 (1993).

52. 515 U.S. 819 (1995).

53. Such an action may also violate parents' substantive due process rights, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), but surely it would violate the Free Speech Clause, too: As the Court has noted, the *Pierce* and *Meyer* holdings overlap in considerable measure with First Amendment protections. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969):

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In [*Meyer v. Nebraska* and a companion case], this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. See *Pierce v. Society of Sisters*, etc., 268 U.S. 510 (1925) [followed by a string cite of several Free Speech Clause cases and two Establishment Clause cases].

See also *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (citations omitted):

The right to educate a child in a school of the parents' choice—whether public or private or parochial [and] . . . the right to study any particular subject or any foreign language . . . [have] been construed to [be] include[d in the First Amendment] By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. State of Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. With-

fund all other accredited secular schools from discriminating against religious schools because of the religiosity of the viewpoints they teach.

Even the Court's Establishment Clause cases suggest that the government may no more discriminate against religion than discriminate in its favor. Under all its leading Establishment Clause tests,⁵⁴ the Court has used the language of evenhandedness. Under the *Lemon* test, the government may not do things that have the primary effect of advancing or inhibiting religion.⁵⁵

out those peripheral rights the specific rights would be less secure.

And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

54. Except the coercion test, which has been used in only one majority decision, *Lee v. Weisman*, 505 U.S. 577 (1992).

55. "Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality). "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here [in disqualifying ministers from office]." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment). "[A] generally applicable tax has a secular purpose and neither advances nor inhibits religion [thus not violating the Establishment Clause], for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief." *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 394 (1990). See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (Brennan, J., for the plurality) (stating that the principle "that government may not be overtly hostile to religion" is part of "the requirement that . . . [a statute's] principal or primary effect . . . be one that neither advances nor inhibits religion").

For other cases repeating the symmetrical requirement of no advancement and no inhibition, see *Agostini v. Felton*, 117 S. Ct. 1997, 2015 (1997) (finding no "excessive entanglement" that advances or inhibits religion"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) ("[t]he challenged governmental action . . . does not have the principal or primary effect of advancing or inhibiting religion"); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) ("to be permissible under the Establishment Clause, . . . [a statute or practice] must neither advance nor inhibit religion in its principal or primary effect"); *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) ("the primary effect of [the law] is neither to advance nor inhibit religion"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (holding that the law has "a principal or primary effect . . . that neither advances nor inhibits religion"); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("the statute's principal or primary effect must be one that neither advances nor inhibits religion"); *id.* at 617 (Scalia, J., dissenting) ("a State which discovers that its employees are inhibiting religion must take steps to prevent them from doing so"); *School Dist. v. Ball*, 473 U.S. 373, 383 (1985) ("[we] go on to consider whether the primary or principal effect of the challenged programs is to advance or inhibit religion"); *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) ("a statute must have . . . a principal or primary effect that neither advances nor inhibits religion"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) ("[a statute's] primary effect must not advance or inhibit religion"); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985)

Under the endorsement test, the government may not express endorsement *or disapproval* of religion.⁵⁶ In its earlier cases, the

("statutes must have . . . a principal or primary effect that neither advances nor inhibits religion"); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 n.30 (1985) ("the criteria to be used in determining whether a statute violates the Establishment Clause are [among other things] . . . whether its primary effect is one that neither advances nor inhibits religion"); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("we have often found it useful to inquire . . . whether [a government action's] principal or primary effect is to advance or inhibit religion"); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (a statute's "principal or primary effect must be one that neither advances nor inhibits religion"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) ("the statute[']s . . . principal or primary effect must be one that neither advances nor inhibits religion"); *Larson v. Valente*, 456 U.S. 228, 235 n.8 (1982) (the "second test [under the standard Establishment Clause inquiry] requires that the 'principal or primary effect' of the challenged statute 'be one that neither advances nor inhibits religion'"); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("a policy will not offend the Establishment Clause if it can pass a three-pronged test," one prong being that the policy's "principal or primary effect must be one that neither advances nor inhibits religion"); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (same); *Harris v. McRae*, 448 U.S. 297, 319 (1980) (same); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980) ("a legislative enactment does not contravene the Establishment Clause if [among other things] . . . its principal or primary effect neither advances nor inhibits religion"); *McDaniel v. Paty*, 435 U.S. 618, 636, n.9 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) ("under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion"); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (to pass Establishment Clause scrutiny, a law "must have a principal or primary effect that neither advances nor inhibits religion"); *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) (same); *Hunt v. McNair*, 413 U.S. 734, 744 (1973) ("we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion"); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) ("we consider . . . [whether] the primary effect of the Act [is] to advance or inhibit religion"); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that one of the Establishment Clause tests is that "a law's principal or primary effect must be one that neither advances nor inhibits religion"); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) ("If either [the purpose or the primary effect of an enactment] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution"); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) ("to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion"); *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (same).

56. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment) ("[e]very government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion"); *Board of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[c]ases involving government speech on religious topics . . .

Court stressed that the government ought not show favoritism *or hostility* to religion.⁵⁷ These statements have largely been dicta, but the Court has repeated them so often that we must assume that it meant them (unless we conclude that it was just mouthing the language of evenhandedness to better sell its unpopular holdings). And if giving special benefits to religion is favoritism,

require an analysis focusing on whether the speech endorses or disapproves of religion"); *Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) ("[b]ecause the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion'"); *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) ("it is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval . . . of their individual religious choices'"); *id.* at 625 (O'Connor, J., concurring in part and concurring in the judgment) ("[t]he government violates [the Establishment Clause] if it endorses or disapproves of religion"); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion"); *School Dist. v. Ball*, 473 U.S. 373, 389 (1985) ("[if] . . . identification [of the government with religion] conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated"); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1984) ("[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion'"); *id.* at 74 (O'Connor, J., concurring in the judgment) (discussing how the Court should determine "whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion"); *id.* at 69 ("the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community"); *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984) (O'Connor, J., concurring) ("[t]he second and more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion").

57. "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (Black, J., for the majority); *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment). "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "[T]he State may not . . . affirmatively oppos[e] or show[] hostility to religion, thus 'preferring those who believe in no religion over those who believe.'" *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963). "The First Amendment leaves the Government in a position not of hostility but of neutrality." *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring). See also cases cited *infra* note 59; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (Brennan, J., for the plurality) (concluding that part of the Establishment Clause's requirements is "that government may not be overtly hostile to religion"); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., dissenting) ("[t]he Establishment Clause mandates state neutrality, not hostility, toward religion"); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) ("[f]or decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion").

advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval.⁵⁸

Finally, the Court has often said that religious discrimination violates the Equal Protection Clause,⁵⁹ though it has generally said this about discrimination among religious sects, this principle should at least presumptively apply to discrimination between religious and nonreligious people and institutions. Whether a person, a message, or a curriculum is religious should be as irrelevant to a secular government as is the particular flavor of religion to which the person, message, or curriculum adheres.⁶⁰ (I

58. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (discriminating against religious speakers "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"); *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) ("if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"); *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality) ("refusal to extend [a generally available] exemption to an instance of religious hardship suggests a discriminatory intent . . . [and thus] tends to exhibit hostility, not neutrality, towards religion"); *Aguilar v. Felton*, 473 U.S. 402, 420 (1985) (O'Connor, J., dissenting) (concluding that excluding religious schools from the generally applicable program at issue in the case "[r]ather than showing the neutrality the Court boasts of, . . . exhibits nothing less than hostility toward religion"); *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) ("the exclusion [of ministers from the legislature] manifests patent hostility toward, not neutrality respecting, religion").

It will not do to argue that discriminating against religion in funding isn't hostility or inhibition because it merely denies religion a benefit and thus leaves it alone—discriminatory denial of a benefit that is available to everyone else is indeed hostility and inhibition. Compare *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), where the Court (per Justice Brennan's plurality opinion) struck down a religion-favoring tax exemption: Though it might be argued that a tax exemption isn't advancement or favoritism, but merely leaving religion alone, the better view—and the view the Court took in *Texas Monthly*—is that discriminatory exemption from taxes is a form of advancement. By the same logic, discriminatory exemption from a general subsidy program is a form of inhibition.

59. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Board of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900); see also *State v. Madison*, 240 Md. 265, 274, 213 A.2d 880, 885 (1965); *Juarez v. State*, 102 Tex. Crim. 297, 304, 277 S.W. 1091, 1094 (1925). These statements have generally been made in dictum (though in *Niemotko*, *Madison*, and *Juarez* they were holdings), perhaps because overt government discrimination based on religion has fortunately been relatively rare in recent times; still, I've heard no one deny that this dictum is quite right.

60. Even Erwin Chemerinsky, who believes that school choice programs violate the Establishment Clause, concludes that some forms of discrimination against religious institutions would violate the Equal Protection Clause: "[It]

disagree with the Court's statement in *Corporation of Presiding Bishop v. Amos* that such discrimination should only be subject to Establishment Clause scrutiny and not Equal Protection Clause scrutiny,⁶¹ though I think the ultimate result in *Amos* may be justifiable on other grounds.)

There are certainly strains in the Court's jurisprudence—including the holding in *Sloan v. Lemon* (1973)⁶²—that work against this argument, just as the strains I identify work in its favor. Moreover, it may be hard to imagine the Court jumping from the current regime, in which it isn't clear whether equal treatment of religion is even allowed, to one in which such equal treatment is required.⁶³

But I think the core understanding of the clauses, as it has evolved through the totality of the Court's jurisprudence, supports my view. The Free Exercise Clause is generally and properly understood as barring discrimination against religion. The Free Speech Clause is generally and properly understood as barring discrimination against religious speech, a constraint that fits well into the general principle that free speech means no government discrimination based on viewpoint (or often even content). The Equal Protection Clause asserts that certain traits, including religion and, I believe, religiosity, should not be bases for governmental classifications. And the Establishment Clause, as I argue above, supports, and at the very least does not oppose, this

would be clearly unconstitutional if the government provided no public services—no police or fire protection, no sanitation services—to religious institutions. Such discrimination surely would violate equal protection and infringe free exercise of religion." CHEMERINSKY, *supra* note 19, at 1005.

61. 483 U.S. 327, 339 (1987).

62. 413 U.S. 825, 834 (1973) (holding that excluding religious schools from generally available school choice program is required by the Establishment Clause and isn't barred by the Equal Protection Clause). *But see* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 n.4 (1993) (concluding that the Court need not reach the question whether the exclusion of religious views from a generally applicable benefit "violated the Establishment Clause because it . . . demonstrate[d] hostility to religion").

63. It's tempting to suggest that the Constitution "does not require what it barely permits," to borrow a phrase from *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997), which held that a state may constitutionally ban race preferences; but this is a false analogy. The Constitution "barely permits" race preferences in the sense that race preferences are presumptively suspect; thus, even if the government may at times implement them, it certainly has no obligation to do so. But if the view expressed in Part A is correct, then the Constitution doesn't "barely permit" equal treatment of religion—such equal treatment isn't presumptively suspect, because the Establishment Clause concerns itself only with preferential treatment. There is therefore nothing odd about the Constitution not just permitting, but requiring, nondiscrimination based on religiosity.

understanding: Its core meaning is no *special* benefit for religion—"establishing" something must necessarily mean treating it *better* than its rivals.

In fact, since 1995 three circuit courts of appeal have in some measure adopted an analysis much like this one, holding (at least in some government subsidy contexts) that the government may not discriminate against religious institutions. *Columbia Union College v. Clarke* held that excluding religious educational institutions from a generally available funding program presumptively violates the Free Speech Clause and possibly the Free Exercise and Equal Protection Clauses.⁶⁴ The court held that the presumption was rebutted because including religious institutions in the particular program—a program that directly funded colleges, rather than a choice program that supported the decisions of students—would have violated the Establishment Clause; but the court made clear that had inclusion of the religious schools been permissible under the Establishment Clause (as I argue inclusion of religious schools in school choice programs would be), it would have been mandatory under the Free Speech Clause.

Likewise, *Peter v. Wedl* held that excluding religious schools from participation in a generally available Individuals with Disabilities Education Act program "explicitly discriminated against children who attended private religious schools," and that such "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment, the Free Speech Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment."⁶⁵ Finally, *Hartmann v. Stone* struck down an Army regulation that excluded child care providers who "teach or promote religious doctrine" from a general program that let child care providers use government-owned housing on military bases. Such an exclusion, the court concluded, violated the Free Exercise Clause because it singled out religious practices for exclusion.⁶⁶

64. 159 F.3d 151, 155-57 & n.1 (4th Cir. 1998).

65. 155 F.3d 992, 996 (8th Cir. 1998).

66. 68 F.3d 973, 977-79 (6th Cir. 1995). *But see* *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d. Cir. 1997) (concluding that excluding religious organizations from an otherwise open nonpublic forum didn't violate the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause); *Bagley v. Raymond Sch. Dep't*, No. CUM-98-281, 1999 WL 236464 (Me. Apr. 23, 1999) (concluding that excluding religious schools from general school choice program doesn't implicate the Free Exercise, Establishment, and Free Speech Clauses, and concluding that while the exclusion triggers strict scrutiny under the Equal Protection Clause, the scrutiny is satisfied because the Establishment Clause

But in any event, even if these courts are mistaken about the constitutional mandate of equality, surely the Constitution at least allows such equality. Religious people or institutions ought not be treated better than secular people or institutions. But nothing in the Constitution requires that they be treated worse.

requires such an exclusion); *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 372, 771 P.2d 1119, 1123 (1989) (seemingly acknowledging that discrimination against religious institutions requires strict scrutiny under the Equal Protection Clause, but concluding that the state has a compelling interest "in ensuring the separation of church and state, as required by the Constitution of the State of Washington").

