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Donald L. Beschle

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# The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor

*Donald L. Beschle\**

The past few years have seen a flurry of litigation involving the religion clauses of the first amendment. The Supreme Court has spoken on the subject as frequently as it did during the 1960s, when it created the current legal framework for dealing with claims under the establishment and free exercise clauses. But the recent cases, while numerous, have contributed little to the development of first amendment thought. Although individual Justices have suggested new approaches, the Court has generally confined itself to measuring the facts before it against existing analytical yardsticks.

The continued use of a particular framework for analysis may be taken as evidence of its essential soundness. However, there is reason to believe that in the case of the religion clauses it more clearly reflects the Court's failure to create satisfactory alternatives, despite the need for such alternatives. The dominant religion clause tests, particularly for the establishment clause, have been easy targets for academic critics and judges alike.

The principal flaw in establishment clause thought is the acceptance of "separation" of church and state as the clause's ultimate goal. Given the ways in which both institutions have evolved in the two centuries since Jefferson's use of the term, separation of church and state is simply impossible. An unrealistic goal is bound to lead those who pursue it to unsatisfactory results. As long as first amendment analysts accept "separation" as their goal, there is little reason to believe that any valuable alternatives to current religion clause tests will emerge. *Stare decisis*, or simple inertia, will assure the survival of current doctrine, however imperfect.

A much more realistic and fruitful end for religion clause analysis can be found in the overall context of the first amendment. That provision is the clearest indication that an attitude of classic liberalism, tolerance, is a central tenet of our constitutional system. Tolerance does not require separation—a conscientious avoidance of all nonessential contact with any one viewpoint. What it does require is an attitude of liberal neutrality. Government must avoid influencing individual choices among competing religious or irreligious value systems through policies which provide incentives to adhere to one or another value system or through measures which, though less concrete in their effect, constitute a government endorsement of a religious or irreligious viewpoint.

Ironically, the most direct endorsement of this position of liberal neutrality has come from one of the Supreme Court's most consistent

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\* Associate Professor of Law, John Marshall Law School; J.D., New York University.

conservatives, Justice O'Connor. She has indicated in several separate opinions her belief that, at least for establishment clause purposes, the Court should ask whether the government practice at issue can reasonably be perceived as government endorsement of a religious or irreligious belief. Because the Court has not adopted Justice O'Connor's approach, it is not clear how the test would be applied.

This article first discusses the state of the law the Court has created in pursuing the ideal of separation. This article will then set out the rationale for the use of liberal neutrality, rather than separation, as the basis for religion clause analysis, and also explain how courts might apply such a standard in the types of disputes they frequently encounter under both the establishment and free exercise clauses.

None of what follows purports to elaborate on what Justice O'Connor herself necessarily draws from the view that the absence of government endorsement is the core of the religion clauses. Rather, it discusses why such a position is preferable to present law, and explores the implications of that position.

## I. The Evolution of Religion Clause Doctrine

First amendment doctrine concerning the relationship of church and state has evolved along two tracks interpreting the two related religion clauses. Establishment clause cases<sup>1</sup> involve challenges to government support of religion. Free exercise clause cases,<sup>2</sup> on the other hand, challenge government interference with the practice of a citizen's faith. The clauses are closely related, and the development of rules with respect to one has serious implications for the scope of the other. Despite this connection, and calls for approaches which will synthesize the clauses so that they may be analyzed under a single standard,<sup>3</sup> the case law under each clause has emerged separately. Almost all of the significant law under each clause is a product of the last forty years.

### A. *The Establishment Clause*

Establishment clause doctrine has largely developed out of disputes involving education, both public and private. Although a handful of earlier Supreme Court cases touched, at least indirectly, upon establishment clause concerns,<sup>4</sup> the 1947 case of *Everson v. Board of Education*<sup>5</sup> is the

1 "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

2 "[O]r prohibiting the free exercise thereof . . . ." *Id.*

3 The most prominent of these calls for a unitary test for analysis of both clauses are probably those of Professors Phillip Kurland and Jesse Choper. See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

4 The Court rejected with a single sentence the argument that the provision of the World War I Selective Draft Act granting exemption from combat service for members of "any well-recognized religious sect or organization" holding pacifist views was an establishment of religion. The contention was dismissed because "its unsoundness is too apparent to require us to [discuss it at length]." *Arver v. United States*, 245 U.S. 366, 390 (1918).

In *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), the Court sustained a Louisiana program under which the State Board of Education would purchase textbooks and distribute them to private school students. The challenge to the program was that it violated not the first

foundation for contemporary analysis of the clause. In this case, the Supreme Court sustained a New Jersey statute which provided for the use of tax money to reimburse parents for the cost of transporting their children to parochial schools. Opponents claimed that such a scheme was a "law respecting an establishment of religion" and therefore unconstitutional. Although the Court upheld the statute, Justice Black, writing for the Court, used language indicating that any government aid to religion would undergo the most severe scrutiny:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>6</sup>

The New Jersey program survived because the Court classified the benefits as provided to the children and parents as part of a broad program of benefits granted to all citizens of the state regardless of religious affiliation, not to church-affiliated schools themselves.<sup>7</sup> However, the strict separationist language of *Everson* has become one of the most influential paragraphs of dicta in all of constitutional law. It soon became apparent that the case would be remembered more for its broad definition of impermissible government conduct than for its holding that the first amendment permits reimbursement for the cost of bus transportation to religious schools.

In *McColum v. Board of Education*,<sup>8</sup> the focus of the Court's concern shifted to the public school classroom. A program in an Illinois school

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amendment, but the due process clause of the fourteenth amendment. Appellants perceived the program as an invalid use of public funds for a private purpose. The Supreme Court found, however, that the program clearly benefitted the state by directly aiding not the private schools, but the children of Louisiana. That *Cochran* did not explicitly deal with the first amendment is unsurprising; it was not until *Cantwell v. Connecticut*, 310 U.S. 296 (1940), that the Supreme Court held that "the liberties guaranteed by the First Amendment" were incorporated into the fourteenth amendment, and therefore applied to the states. *Id.* at 303.

5 330 U.S. 1 (1947).

6 *Id.* at 15-16.

7 *Id.* at 17-18.

Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

*Id.* at 18.

8 333 U.S. 203 (1948).

district, similar to those in many other parts of the country,<sup>9</sup> allowed teachers from religious organizations to offer thirty minutes a week of religious instruction in public schools during normal school hours. Students could elect to attend one of those classes, or "to leave their classrooms and go to some other place in the school building for pursuit of their secular studies."<sup>10</sup> The Court, citing *Everson* for the proposition that the first amendment "created a wall of separation between Church and State," held the program unconstitutional. The Court reasoned that the use of tax-supported schools "for the dissemination of religious doctrines" afforded "invaluable aid" to religion.<sup>11</sup>

The "wall of separation" proved a less formidable barrier four years later in *Zorach v. Clauson*.<sup>12</sup> A New York City program permitted public schools to release students, on written request of their parents, from the school premises to go elsewhere for religious instruction during the school day. Students not released would remain in the public school for secular instruction or other activity. Churches and other organizations providing "released time" religious education would make weekly attendance reports to the public schools to assure that released children actually did report for such studies.<sup>13</sup> The Court upheld the program against establishment clause challenge, finding that the simple act of releasing children without the use of public facilities for religious instruction was merely an act of neutrality on the part of the state toward religion. The first amendment, held the Court, "does not say that in every and all respects there shall be a separation of Church and State."<sup>14</sup> Justice Douglas, for the Court, summarized the effect of the establishment clause:

Government may not finance religious groups or undertake religious instruction, nor blend secular and sectarian education nor use secular

9 "According to responsible figures almost 2,000,000 [children] in some 2,200 communities participated in 'released time' programs during 1947." *Id.* at 224-25 (Frankfurter, J., concurring).

10 *Id.* at 209. The existence of a secular alternative did not make the program sufficiently neutral to eliminate constitutional objections. The concurring Justices found that this arrangement "presents powerful elements of . . . pressure by the school system" upon the children toward attending one of the religious classes. *Id.* at 227 (Frankfurter, J., concurring).

11 *Id.* at 212. Respondents challenged the "wall of separation" language of *Everson* as dicta. The Court specifically rejected the challenge, reaffirmed the "wall" language, and even embellished it. The amendment "erected a wall . . . which must be kept high and impregnable." *Id.*

12 343 U.S. 306 (1952).

13 *Id.* at 308. State law authorized absence from public schools for religious education subject to rules promulgated by the Commissioner of Education. The Commissioner established the program of released time "outside the school grounds," limited to one hour a week, "at the end of a class session." Local regulations supplemented the state rules, adding provisions to further distance the religious instruction from the public schools. The rules provided "[n]o announcement of any kind will be made in the public schools relative to the program," and "[t]here shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction." *Id.* at 308-09 n.1.

14 *Id.* at 312. "Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." *Id.* This may be the only time the Court has described the religion clauses as providing specificity. Justice Douglas also goes on to list "common sense" accommodations between church and state which do not constitute an establishment of religion. In the course of this discussion, he states "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. This may be the single strongest "accommodationist" statement in any modern religion clause opinion of the Supreme Court.

institutions to force one or some religion on any person . . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction . . . .<sup>15</sup>

While the language is not radically different from Justice Black's in *Everson*, the stress on "neutrality" and absence of coercion is somewhat less harsh than the Jeffersonian emphasis on maintaining the wall between church and state.

These early cases failed to provide any workable test for establishment clause analysis. The term "wall of separation" is merely a rhetorical flourish. It cannot be meant to invalidate all contact between the state and religious institutions. If *Zorach* is read to mean that coercion is the key evil the establishment clause guards against, it gives somewhat more substance to establishment clause analysis. But still, coercion can be defined so broadly as to make it of little use in predicting the constitutionality of any but the most clearly invalid statutes. Indeed, three dissenters found the New York program at issue in *Zorach* to be coercive.<sup>16</sup>

During the 1960s, in ruling on spoken prayer and bible reading in the public schools, the Court first enunciated what would develop into the prevailing test for establishment clause cases. *Engel v. Vitale*<sup>17</sup> found unconstitutional the recitation of government-written prayers in public schools, even where students were not forced to recite those prayers over their parents' objection.<sup>18</sup> Justice Black, writing for the court as he had in *Everson* and *McCollum*, explicitly rejected *Zorach's* suggestion that coercion was the essential factor in an establishment clause violation: "the Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."<sup>19</sup> In *Engel*, the program's encouragement of a certain set of religious beliefs was sufficient to violate the establishment clause.<sup>20</sup>

<sup>15</sup> *Id.* at 314.

<sup>16</sup> Justice Black characterized the program as one designed "to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so . . .," and labelled the program as "coercive." *Id.* at 318 (Black, J., dissenting). Justice Jackson, in an opinion endorsed by Justice Frankfurter, found the program to be "founded on the State's power of coercion." *Id.* at 324 (Jackson, J., dissenting). Displaying a rather interesting attitude toward public school time (though one most likely consistent with that of some children), he stated that by giving the student the option of off-premises religious education or another hour of public school, the state makes the school "a temporary jail for a pupil who will not go to Church." Presumably, it would not be impermissible under this reasoning to release all children from school one hour early on one day a week, allowing them to do whatever they wished to do, religious or not. *See id.* at 320 (Frankfurter, J., dissenting).

<sup>17</sup> 370 U.S. 421 (1962).

<sup>18</sup> Forced recitation of the prayer may have violated the first amendment without any need to specifically rely on the religion clauses at all. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating regulation requiring public school children to salute the American flag).

<sup>19</sup> 370 U.S. at 430.

<sup>20</sup> The prayer in question was one composed by the State Board of Regents, the body supervising the state public school system. The prayer, designed to "be subscribed to by all men and women of goodwill," read as follows: "Almighty God, we acknowledge our dependence upon thee, we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422-23. The state argued

The Court, having expressly rejected coercion as a touchstone, set forth a new test in *Abington Township School District v. Schempp*,<sup>21</sup> and held that Bible reading as a devotional exercise in public schools was unconstitutional:

[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that 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.<sup>22</sup>

Under this two-step test, the Supreme Court upheld a New York program requiring local public school districts to lend secular-subject textbooks to private school students.<sup>23</sup> Stressing that the aid in question was provided directly to the children rather than to the religious institutions which they attended, the Court held that the state's purpose of providing all children a quality education in secular subjects was legitimate, and that the primary effect of the program was the furtherance of secular education.<sup>24</sup> Conversely, in the same year, the Court invalidated a forty year-old Arkansas statute which prohibited the teaching of theories of evolution in public schools and universities.<sup>25</sup> The purpose of the statute, to suppress theories inconsistent with the Book of Genesis concerning the origin of the human species, was held to be clearly religious.<sup>26</sup>

In 1971, the *Schempp* two-part test became the three-part test currently in use. In *Lemon v. Kurtzman*,<sup>27</sup> the Supreme Court struck down two programs of public aid to parochial schools. Rhode Island, in one, paid teachers in private elementary schools a supplement equal to fifteen percent of their annual salary. In the other, Pennsylvania reimbursed private schools for the cost of books and teacher salaries in certain secular subjects.<sup>28</sup> In each case, the Court found that the legitimate purpose

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that the nondenominational nature of the prayer, combined with the voluntary nature of its recital, eliminated establishment clause concerns. The Court, however, rejected the argument, holding that "[t]here can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer." *Id.* at 430.

21 374 U.S. 203 (1963).

22 *Id.* at 222. The Court's opinion largely abandoned the "wall of separation" metaphor of earlier cases. Acknowledging that "[t]he history of man is inseparable from the history of religion," Justice Clark repeated the theme of "neutrality" as the central touchstone of his analysis. *Id.* at 212 (quoting *Engel*, 370 U.S. at 434).

23 Board of Educ. v. Allen, 392 U.S. 236 (1968).

24 *Id.* at 243. "[P]rivate education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." *Id.* at 247.

25 *Epperson v. Arkansas*, 393 U.S. 97 (1968).

26 *Id.* at 107. The antievolution statute could be perceived as a modern equivalent of criminal prohibitions against blasphemy. They are both "effort[s] to prevent (by censorship) or punish the presentation of intellectually significant matter which contradicts accepted social, moral or religious ideas." *Id.* (quoting Leflar, *Legal Liability for the Exercise of Free Speech*, 10 ARK. L. REV. 155, 158 (1956)). Justice Black, concurring on the ground that the statute was impermissibly vague, questioned whether removing something from the curriculum, rather than including it, could be an establishment. If Darwinian theory is itself anti-religious rather than merely nonreligious, removing the entire subject of the origin of the human species from public schools might be a quite proper effort to keep religious disputes out of those schools. *Id.* at 113 (Black, J., concurring).

27 403 U.S. 602 (1971).

28 The Rhode Island statute provided a number of limitations on the grants. The teachers re-

of enhancing the quality of the secular education motivated the legislature.<sup>29</sup> However, rather than deciding whether the programs had the primary effect of aiding religion, the Court held that even if their primary effect was secular, they violated the establishment clause by creating "excessive entanglement between government and religion."<sup>30</sup>

This new third part of the establishment clause test grew out of the 1970 decision in *Walz v. Tax Commission*.<sup>31</sup> In this case, the Court upheld state tax exemptions for religious property along with other property devoted to nonprofit or charitable purposes by secular organizations. Among the reasons put forth by the Court for its holding was the contention that to tax property used for religious purposes would require extensive state involvement to assess the property, to address the question of which uses were purely religious and which were charitable but of a secular nature, and to collect the tax and possibly foreclose on church property for nonpayment.<sup>32</sup> Such "entanglement," with agents of the state sitting in judgment of the church, would violate first amendment freedoms.<sup>33</sup> In *Lemon*, the Court saw the same potential problems. Subsidized teachers, unlike the subsidized textbooks previously held permissible, might intentionally or unintentionally inject religious instruction while on state-subsidized "secular" time. To assure that this was not happening would require "comprehensive, discriminating, and continuing state surveillance."<sup>34</sup>

*Lemon*, then, established the three-part test which has become the standard tool for establishment clause analysis. Government action, to avoid violating the clause, must: (a) "have a secular legislative purpose;" (b) have a "principal or primary effect . . . that neither advances nor in-

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ceiving the supplements not only had to be state-certified, but had to teach only subjects offered in the state's public schools, using only materials used in those schools. The school at which the teacher worked had to have a lower per-pupil expenditure "on secular education" than the average of the state's public schools, and with the supplement included, a teacher's salary could not exceed the maximum paid to public school teachers in the state. *Id.* at 607-608. The Pennsylvania statute was less detailed, providing reimbursement of schools' actual expenditures for instruction in the following subjects: mathematics, modern foreign languages, physical sciences and physical education. All instructional materials for these courses had to receive state approval, and even the listed subjects were not eligible for reimbursement if they contained any religious teaching. The school seeking reimbursement would identify the costs of the secular subjects by use of a prescribed accounting system, subject to state audit. *Id.* at 609-10.

<sup>29</sup> *Id.* at 613.

<sup>30</sup> *Id.* at 613-14.

<sup>31</sup> 397 U.S. 664 (1970).

<sup>32</sup> *Id.* at 674. The Court's central holding, apart from the danger of government involvement in religion if religious property was taxed, was that the tax exemptions, as part of a broad set of exemptions for charitable and educational property, were nothing more than a position of neutrality. Writing for the Court, Chief Justice Burger stated that "[s]eparation in this context cannot mean absence of all contact [between church and state]." *Id.* at 676. "[T]here is room for . . . a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669.

<sup>33</sup> "Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers." *Id.* at 673.

<sup>34</sup> 403 U.S. at 619. The Court went on to note the danger of "entanglement of yet a different character" latent in the statutes. With state aid to private schools a permissible, but not required, course for government to take, much divisive political activity is likely to occur as a result of the desirability of such aid. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622.



hibits religion;" and (c) avoid "an excessive government entanglement with religion."<sup>35</sup> Under this test, the Supreme Court has invalidated most programs of state aid to private schools that it has considered. The Court struck down a New York program providing tuition reimbursement to low income families with children in nonpublic schools, and tax deductions for middle income families with such children, as having the effect of aiding religion.<sup>36</sup> Another New York program, which provided for state payments to private schools to cover the expense of preparing and administering state-mandated examinations, was also held unconstitutional.<sup>37</sup> Since private school teachers prepared the tests, the Court reasoned that there was insufficient assurance that the tests would be completely free of religion. Pennsylvania's attempts to aid parochial schools met the same fate. The Court held that providing public school personnel for psychological services, guidance counseling and remedial teaching on parochial school premises would require extensive surveillance of their activity and therefore would excessively entangle church and state. Providing instructional materials such as projectors, laboratory equipment and maps, was held unconstitutional as having the primary effect of advancing religion.<sup>38</sup>

Programs of direct aid have survived constitutional attack only where the state provided materials which public school employees had prepared and which private schools would use in circumstances requiring no further supervision to assure that they were not used to further religion. In *Wolman v. Walter*,<sup>39</sup> the Supreme Court reaffirmed the constitutionality of loaning textbooks to parochial school students, and approved the reimbursement of private schools for the cost of administering state-mandated standardized (as opposed to parochial teacher-created) tests. The Court also allowed public school employees to perform counseling and remedial services for private school students where the services were performed away from the premises of the church-affiliated schools.<sup>40</sup>

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<sup>35</sup> *Id.* at 612-13.

<sup>36</sup> *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

<sup>37</sup> *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973).

<sup>38</sup> *Meek v. Pittenger*, 421 U.S. 349 (1975). The Court distinguished this assistance from permissible textbook loan programs on the rather mechanical distinction that these materials would be provided directly to the religious school itself, rather than the students. *Id.* at 362-63.

<sup>39</sup> 433 U.S. 229 (1977).

<sup>40</sup> The Court struck down several other aspects of the state's program of aid to nonpublic schools. For example, loans for educational materials which might include "projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like" were found to have the primary effect of advancing religion. *Id.* at 249. Although unlike the program at issue in *Meek*, Ohio formally loaned the equipment to the children and their parents, rather than to the schools, the Court found the distinction to be merely formalistic. *Id.* at 250. Funding of transportation costs for field trips for nonpublic school students to the same extent that such trips were funded for public school students was also found unconstitutional. The Court held that unlike the transportation involved in *Everson*, field trips "are an integral part of the educational experience," and since they are chosen and structured by employees of religious schools, they carry "an unacceptable risk of fostering religion." *Id.* at 254.

As confusing as the Court's holdings were, the manner in which they were set forth is even more obscure. Three justices dissented from the Court's permissive stance toward some parts of the Ohio program, three others dissented from the Court's stance in striking down other parts. Justice Powell concurred in all the Court's findings except those relating to field trip transportation. Even among Justices who voted alike, rationales were not always the same. See *id.* at 255-66 (separate opinions).

Although aid to parochial schools was the most frequently litigated establishment clause issue in the decade following *Lemon*, the Supreme Court occasionally applied the three-part test in different contexts. In *Stone v. Graham*,<sup>41</sup> the Court held that the posting of the Ten Commandments in public schools was unconstitutional. Despite the Kentucky legislature's assertions that the purpose of the posting requirement was to educate students as to the basis and antecedents of their secular system of law, the Court held that the true motivation was to promote the religious message of the Commandments.<sup>42</sup>

### B. *The Free Exercise Clause*

The present analytic framework for claims under the free exercise clause also developed during the 1960s. Until then, it appeared that although the clause protected an individual's religious beliefs and the communication of those beliefs to others from government interference, it did not protect religious practices from being made illegal or more difficult by otherwise valid state action.

In 1878 the Court explicitly distinguished belief from action in *Reynolds v. United States*.<sup>43</sup> A federal statute making the practice of polygamy illegal in United States' territories was upheld against a constitutional challenge by Mormons who claimed that the provision interfered with the free exercise of their religion. While the Court stated that the first amendment deprived Congress "of all legislative power over mere opinion," it held that government was "free to reach actions which were in violation of social duties or subversive of good order."<sup>44</sup> This distinction between protected beliefs and unprotected acts pursuant to those beliefs survived for eighty years.

In the 1940s, however, a series of decisions involving Jehovah's Witnesses made clear that despite nineteenth century precedent to the contrary, the first amendment protected the expression of belief. Although *Cantwell v. Connecticut*<sup>45</sup> explicitly turned on the question of freedom of religion, holding that the free exercise clause applies to the states as well as the federal government,<sup>46</sup> the case was also a significant decision with respect to freedom of speech. The Court held that a Jehovah's Witness could not be convicted of breach of the peace for playing, in public, a

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Justice Powell begins his separate opinion with a masterpiece of understatement: "Our decisions in this troubling area draw lines that often must seem arbitrary." *Id.* at 272 (separate opinion of Powell, J.).

<sup>41</sup> 449 U.S. 39 (1980).

<sup>42</sup> *Id.* at 41. "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 41-42.

<sup>43</sup> 98 U.S. 145 (1878).

<sup>44</sup> *Id.* at 164. In trying to define the word "religion" as used in the first amendment, the Court turned to Jefferson's famous letter to the Danbury Baptist Association, which stated: "[R]eligion is a matter which lies solely between man and his God . . . the legislative powers of the government reach actions only, and not opinions . . . ." *Id.*

<sup>45</sup> 310 U.S. 296 (1940).

<sup>46</sup> *Id.* at 303.

record containing attacks on the Catholic Church, at least where there was no evidence of a "clear and present danger" to "public peace or order."<sup>47</sup> In doing so, the Court recognized for the first time that the religion clauses protect both "freedom to believe and freedom to act."<sup>48</sup>

After *Cantwell*, the Court struck down a tax on the distribution of literature as applied to the Jehovah's Witnesses.<sup>49</sup> Although the tax was generally imposed upon literature of all kinds and did not single out religious literature, the Court held that the propagation of religion was entitled to special government deference in light of the status of free exercise of religion as a "preferred freedom" under the first amendment.<sup>50</sup> The freedom to communicate religious beliefs logically leads to the freedom to refrain from compelled recitation of ideas contrary to those beliefs. In *West Virginia State Board of Education v. Barnette*,<sup>51</sup> the Court struck down a requirement that all children, including Jehovah's Witnesses who objected on religious grounds, recite the pledge of allegiance to the flag at the start of the public school day.<sup>52</sup>

The free exercise clause, however, did not protect activity that went beyond expression to conduct arguably inessential to such expression. Thus a state could apply child labor laws against the use of children to distribute Jehovah's Witness literature.<sup>53</sup> Furthermore, in *Cox v. New Hampshire*,<sup>54</sup> the Supreme Court held that religious speech was subject to the same content-neutral reasonable time, place and manner restrictions which may be imposed upon other types of first amendment speech. Although the Court held that the establishment clause did not prohibit Congress from permitting exemptions from compulsory military activity

<sup>47</sup> *Id.* at 311.

<sup>48</sup> *Id.* at 303. The Court, however, maintained an important distinction between the two. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303-04.

<sup>49</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>50</sup> *Id.* at 115. Four Justices dissented, arguing that a nondiscriminatory tax, not excessive in amount, did not threaten first amendment values. Just a year earlier, in *Jones v. Opelika*, 316 U.S. 584 (1942), this position had prevailed by a 5-4 vote. The Court granted a rehearing in *Opelika*, vacated its earlier decision, and struck down the local ordinance on the same day the decision in *Murdock* was announced. *Murdock*, 319 U.S. 105 (1943). Eight Justices held to their positions in both *Opelika* and *Murdock*; Justice Rutledge, who had replaced Justice Byrnes, cast the deciding vote in *Murdock* against the ordinance.

<sup>51</sup> 319 U.S. 624 (1943).

<sup>52</sup> *Barnette*, like *Murdock*, was an explicit reversal of a recent decision. *Barnette* overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). Unlike the Court's shift from *Opelika* to *Murdock*, however, several justices changed their prior positions. In *Gobitis*, only Justice Stone dissented. Only three of the six members of the *Gobitis* majority who remained on the Court in 1943 dissented in *Barnette*. If an analytical difference leading to the Court's shift in *Barnette* exists, it appears to be that *Gobitis* was argued as a question of whether adherents of a particular religion were entitled to an exemption from a generally applicable statute, while in *Barnette*, the challenge was to the statute itself, and its requirement that any child be compelled to speak. The decision, said the Court, did not depend on the petitioner's religious beliefs. *Barnette*, 319 U.S. at 634.

<sup>53</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Acting to guard the general interest in a youth's well-being, the state as *parens patriae* may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

*Id.* at 166.

<sup>54</sup> 312 U.S. 569 (1941).

for those whose religions required pacifism,<sup>55</sup> other decisions made it clear that the free exercise clause did not require such exemptions.<sup>56</sup> In other words, Congress could compel activity in the public interest from those who had religious objections to such activity, even where the activity involved was the enormously morally significant one of engaging in war.

Until 1963, then, the jurisprudence of the free exercise clause appeared to be rather simple to state, if not to apply. Government could not compel or prohibit belief or expression of belief, but it could limit conduct if it was pursuing legitimate secular ends, even the conduct of those whose religious scruples would be seriously offended by such conduct. As late as 1961, the Supreme Court applied such a distinction in upholding Sunday closing laws, not only against establishment clause claims, but also against claims that such laws impaired the free exercise of religion by Jewish and Seventh-Day Adventist merchants whose religions prohibit work on Saturday.<sup>57</sup> The Court reasoned that while closing for two days a week was a burden, the statutes did not interfere with any beliefs; they merely regulated activity for valid secular reasons.<sup>58</sup>

*Sherbert v. Verner*<sup>59</sup> was the first decision in which the Court extended the protection of the free exercise clause beyond belief and expression. A Seventh-Day Adventist challenged South Carolina's requirement that a worker must be willing to accept jobs requiring Saturday work in order to collect unemployment compensation.<sup>60</sup> The Court held that to force a sabbatarian to choose between unemployment compensation and the tenets of her religion was the equivalent of "a fine imposed against ap-

55 *Arver v. United States* [Selective Draft Law Cases], 245 U.S. 366 (1918). The establishment clause contention was disposed of in a single sentence, stating that the "unsoundness [of the claim of unconstitutionality] is too apparent to require us to do more." *Id.* at 390. The establishment clause claim was a small part of a broad attack on the constitutionality of the World War I draft. In order to avoid establishment clause problems, however, an exemption on religious grounds must not be either worded or interpreted to favor one religion over another. See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).

56 While a Supreme Court case has never precisely held this, the conclusion that the free exercise clause does not compel draft exemptions for pacifists can be drawn from *Gillette v. United States*, 401 U.S. 437 (1971), in which the Court held that the clause did not require exemptions for those who had religiously based objections to particular wars, and earlier cases in which the Court held that pacifists must comply with the general requirement that in order to become a naturalized citizen, an applicant must take an oath to "defend the Constitution and laws of the United States against all enemies" and give an affirmative answer to the specific question: "If necessary, are you willing to take up arms in defense of this country?" *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. MacIntosh*, 298 U.S. 605 (1931).

57 *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

58 As the Court stated, the legitimate secular interest involved is:

to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself.

*Braunfeld*, 366 U.S. at 607; see also *McGowan*, 366 U.S. at 444-45.

59 374 U.S. 398 (1963).

60 To be eligible for benefits under South Carolina law, the applicant "must be 'able to work and . . . [be] available for work'; and . . . a claimant is ineligible for benefits '[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him.'" *Id.* at 400-01.

pellant for her Saturday worship."<sup>61</sup> The scope of the decision was unclear. The Court indicated that where a statute caused "substantial" interference with an individual's religion, the state had to show that the application of the statute without exception was necessary to protect a "compelling state interest."<sup>62</sup> The Court also found it significant that South Carolina applied discriminatory standards to those adhering to different religious practices by requiring availability for Saturday work but not for Sunday work.<sup>63</sup> The holding left unanswered the question of whether a statutory scheme which applied to all, not subject to such charges of facial discrimination, violated the free exercise clause.

In *Wisconsin v. Yoder*,<sup>64</sup> the Court considered such a nondiscriminatory statute: Wisconsin's requirement that all children attend school until they reach the age of sixteen.<sup>65</sup> Members of the Old Order Amish successfully argued that applying the statute to them would violate their free exercise rights. Central to Old Order Amish belief is the principle "that salvation requires life in a church community separate and apart from the world and worldly influence."<sup>66</sup> This principle leads them to reject formal education for their children beyond the eighth grade. Formal education beyond elementary school would teach values inconsistent with the Amish faith, and in addition remove children from their community during "the crucial and formative adolescent period" when those children would be learning specific work skills required for adult life among the Amish.<sup>67</sup>

The Court declared that a neutral statute was, indeed, subject to the *Sherbert* test, and that Wisconsin had failed to justify its refusal to allow exemption for the Old Order Amish.<sup>68</sup> The requirement of schooling beyond the eighth grade, it was found, substantially burdened the exercise of the Amish religion. Furthermore, the Court found that the state lacked a compelling interest in requiring one or two additional years of

61 "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

62 *Id.* at 406.

63 *Id.* But the Court went on to indicate that such discrimination was not essential to its holding: "The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects." *Id.*

64 406 U.S. 205 (1972).

65 WIS. STAT. § 118.15 (1969) provided exemptions for any child "not in proper physical or mental condition to attend schools, . . . any child exempted for good cause by the school board . . . or any child who has completed the full four-year high school course." It also allowed home instruction to be substituted for school attendance, but only where such instruction was "approved by the state superintendent as substantially equivalent" to that provided in the schools. 406 U.S. at 207-08.

66 *Id.* at 210.

67 The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society. *Id.* at 211.

68 [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability.

*Id.* at 220.

schooling of Amish children. The latter finding was based on the fact that history had demonstrated that the community life of the Amish effectively prepared its adolescents for adulthood within the Amish community. Since the legitimate state purpose in compulsory education was to prepare children for adult life, the interest of Wisconsin in requiring one type of preparation over another type which had been proven effective was insufficient to justify interference with religion.<sup>69</sup>

Since *Yoder*, the Supreme Court has applied this free exercise clause balancing test in several cases. The Court found that no compelling state interest justified the substantial burden on religion caused by a legislative ban on clergy serving in public office.<sup>70</sup> Similarly, the state interest was insufficient to justify denying unemployment benefits to a worker who quit his job rather than accept transfer to a division engaged in weapons production, where working on such a job would violate the worker's religion.<sup>71</sup> The Court also held that a state university cannot deny student religious groups access to campus meeting facilities generally available to other student groups.<sup>72</sup> On the other hand, the Court has sustained statutes denying the right to solicit donations at a state fair,<sup>73</sup> and requiring that even those who have religious objections to the social security program pay social security taxes.<sup>74</sup>

Each of the religion clauses, then, has given rise to an analytical formula which is much easier to state than to apply. Under the establishment clause, the government may not act to aid religion except where the act has a secular purpose, a primary effect which is also secular, and the act can be administered without excessively entangling church and state. Under the free exercise clause, government may not substantially burden the practice of religion except to satisfy a compelling state interest.

### C. *Criticism and Alternatives*

The current tests for religion clause analysis have drawn heavy criticism since their creation. The imprecision of the Court's terminology has been a frequent target. If it is nearly impossible to foresee what a court will consider the "primary effect" of a statute, or whether a particu-

69 The Court cited expert testimony in the trial court that: "Many public educators would be elated if their programs were as successful in preparing students for productive community life as the Amish system seems to be." *Id.* at 223 n.12 (quoting Erickson, *Showdown at the Amish Schoolhouse: A Description and Analysis of the Iowa Controversy*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 15-53 (D. Erickson ed. 1969)).

70 *McDaniel v. Paty*, 435 U.S. 618 (1978). The state sought to justify the prohibition as necessary to maintain proper separation of church and state. The Court found "no persuasive support for the fear that clergymen in public office will be less careful of antiestablishment interest . . . than their unordained counterparts." *Id.* at 629.

71 *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

72 *Widmar v. Vincent*, 454 U.S. 263 (1981).

73 *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). The rule, which barred peripatetic solicitation and required that such activity be conducted from fixed booths licensed by the fair authorities, was held to be a valid place and manner restriction, furthering the state's interest in the safety and convenience of those using a public forum. *Id.* at 650-51.

74 *United States v. Lee*, 455 U.S. 252 (1982). To allow widespread withdrawal from the social security system would gravely endanger the existence of the system itself. "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260.

lar burden upon religious practice is "substantial," then the utility of the rules, if not their wisdom, is open to question. Even with hindsight, the distinction between the permissible loan of textbooks to parochial school students and the impermissible loan of maps and other instructional aids,<sup>75</sup> and the distinction between public school employees providing services on parochial school premises and those same employees serving the same parochial school students in premises adjacent to the parochial school<sup>76</sup> is less than clear. The very fact that the Court has framed two separate sets of rules has led to an obvious tension between them—to strengthen the mandate that government not aid religion may be to weaken the principle that it may not interfere with religious practice. This tension has given critics of the application of one clause ammunition to attack the Court drawn from the Court's own treatment of the other clause.<sup>77</sup>

In addition to criticism on the basis of vagueness or inconsistency, the religion clause tests have, of course, also been attacked as being simply incorrect. Some of this criticism has come from members of the "original intention" school, who contend that establishment clause doctrine is unfaithful to the framers' intention that the clause restrict only government preference among sects, and not extend to the prohibition of aid to all religions as against irreligion.<sup>78</sup> Such a view has found little support beyond the circle of "original intentionists" in academe, however, and can also be attacked on its own terms as being selective in its use of historical sources.<sup>79</sup> More importantly, like almost all "original intention" jurisprudence, it simply ignores the vast changes in society which make it unclear that even if the framers' ends are immutable standards of constitutional interpretation, the framers' preferred means would, today, bring us closer to those ends.<sup>80</sup>

75 Compare *Board of Educ. v. Allen*, *supra* notes 23-24 and accompanying text, with *Wolman v. Walter*, *supra* notes 39-40 and accompanying text.

76 Compare *Meek v. Pittenger*, *supra* note 38, with *Wolman v. Walter*, *supra* notes 39-40 and accompanying text. Also, compare the Court's treatment of diagnostic services, which may be provided within the walls of the nonpublic school, with its analysis of therapeutic services, which must be banished at least as far as an adjacent trailer. *Wolman*, 433 U.S. at 241-48.

77 See, e.g., Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U.L. REV. 207 (1978) in which the author argues that current establishment clause doctrine "result[s] in the denial of true religious liberty to many Americans" and that the establishment clause should be interpreted in a way which defers to the values underlying the free exercise clause. *Id.* at 209.

78 See, e.g., Corwin, *The Supreme Court as National School Board*, 14 LAW AND CONTEMP. PROBS. 3 (1949), in which the author looks to the framers' intent to severely criticize the *McCullum* decision. For an extreme and rather eccentric judicial attempt to use "original intent" not only to avoid almost all religion clause precedent, but to hold that the establishment clause is not applicable against the states, see *Jaffree v. Board of School Comm'rs of Mobile County*, 554 F. Supp. 1104 (S.D. Ala.), *rev'd sub nom.*, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 105 S. Ct. 2479 (1985).

79 In criticizing the District Court in *Jaffree*, the Supreme Court itself drew on James Madison. 105 S. Ct. 2479, 2488 n.38. Justice Black's opinion in *Everson*, of course, drew on Jefferson. See *supra* notes 5-7 and accompanying text. It seems quite clear that, in fact, different framers had different ideas of just what religious freedom meant with respect to the proper relationship of church and state. See generally M. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 131-66 (1984).

80 For a discussion of this conflict between "abstract and concrete intentions" and the problems with attempting to use "original intent" as the basis of constitutional interpretation, see R. DWORKIN, *A MATTER OF PRINCIPLE* 35-37 (1985).

A number of alternative approaches, less radical than abandoning the position that religion (as opposed to a specific religion) may not be promoted consistent with the establishment clause, have gained some prominence in the last twenty years. Professor Phillip Kurland has suggested a single test for applying both the establishment clause and the free exercise clause. This test requires that the statute in question be facially neutral: its own terms must not single out religion or any religion for favorable or unfavorable treatment.<sup>81</sup> The statute may not categorize in religious terms but the fact that a government policy with secular goals and applied to all might benefit or harm any or all religions would not violate the first amendment.

One commentator has asserted that the free exercise clause requires no special doctrine at all. Rather, it should be read as an intrinsic part of the first amendment and its scheme of protecting thought, belief, and expression.<sup>82</sup> This view restores the pre-*Sherbert* view of the free exercise clause, regarding it as an absolute barrier to government tampering with belief and expression of that belief, but no barrier to regulation of non-expressive conduct. However, such theory contributes little to establishment clause thought; there is no establishment clause equivalent warning against the excesses of other types of first amendment expression.

Professor Jesse Choper has suggested a test which would draw upon, but seriously amend, the *Lemon* test. When a statute is challenged as violating the religion clauses, Choper would have the court ask first, whether the statute lacked a legitimate secular purpose and then, whether it created a real likelihood that it would influence religious beliefs. Only if the statute failed both parts of the test would it be declared unconstitutional.<sup>83</sup>

Other suggestions have been made, including one which would broadly balance the secular effects against the religious effects of a government practice,<sup>84</sup> and one which would return to *Zorach* and ask whether the government was coercing rather than simply aiding belief.<sup>85</sup> While the Supreme Court has not adopted any of those suggestions, the frequency of such criticism and the general lack of enthusiasm among the defenders of the current tests<sup>86</sup> led many to believe that the flurry of church-state cases accepted by the Supreme Court in the early 1980s

81 Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

82 See, e.g., Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

83 Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

84 Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967). With respect to free exercise claims:

A thoroughgoing balancing test would measure three elements of the competing governmental interest. First, the importance of the secular value underlying the governmental regulation; second, the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption for religious reasons would have on the over-all regulatory program.

*Id.* at 1390.

85 Wedlew, *The Establishment Clause and "Coercion"*, 47 MARQ. L. REV. 359 (1963).

86 "I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test. *Lemon v. Kurtzman* identifies standards which have proven useful . . . . It is the only coherent test a majority of the Court has ever adopted." 105 S. Ct. at 2493 (Powell, J., concur-



would lead to serious rethinking of current law, and significant modification of prevailing religion clause doctrine.

## II. The Recent Cases: Reaffirming Unsatisfactory Doctrine

Calls for serious reworking of religion clause doctrine did not lead to the adoption of new frameworks for analysis during the first half of the 1980s. Although Justices have expressed serious misgivings about prevailing law and often have been sharply divided on church-state questions, the religion clause tests developed during the 1960s have survived. At the same time, it is possible to conclude that current law survives because of the inability to frame a more acceptable alternative rather than because of genuine enthusiasm for it.

While most religion clause controversy has focused on the establishment clause, the Supreme Court has faced a number of free exercise issues as well. The Court applied the *Sherbert* balancing test to uphold required participation of an Amish employee in the social security system,<sup>87</sup> and to affirm the requirement that a private university refrain from racial discrimination in order to qualify for tax exemptions.<sup>88</sup> In neither case was there significant dissent. Even when the Court was sharply divided over the outcome of free exercise clause cases, disagreement focused on the proper application of the balancing test rather than the validity of the test itself.<sup>89</sup> The same pattern emerged when the Court sustained a free exercise claim against the refusal of a state university to grant access to campus facilities to student religious groups, where other groups were allowed such access.<sup>90</sup>

Only Justice Rehnquist has set out a serious challenge to the *Sherbert* approach. In *Thomas v. Review Board of Indiana Employment Security Division*,<sup>91</sup> the Court upheld a free exercise challenge to the denial of unemployment benefits to a worker who quit his job rather than accept transfer to a position which would be offensive to his religious convictions. Writing in dissent, Rehnquist pointed to the difficulty of reconciling a broadly applied establishment clause with a similarly broad free exercise clause and noted the anomaly of striking down government attempts to favor religion in cases styled "establishment" cases, while in-

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ring). To point out that a test is "useful" and supported by stare decisis is hardly a ringing endorsement.

87 *United States v. Lee*, 455 U.S. 252 (1982). The Court held that even if the tax imposed a substantial burden on the Amish, the burden was justified since permitting religious exemptions would pose a serious threat to the Social Security Act, indeed to the tax system as a whole.

88 *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The free exercise decision followed the principal issue in the case, whether the IRS had the authority to issue a regulation making racial discrimination grounds for loss of an institution's tax exempt status.

89 This was the case in *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) where the Court upheld regulations barring peripatetic fund solicitation and literature distribution at the Minnesota state fair. See *supra* note 73.

90 *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court held that, having created a forum for general use by student groups, the university could not base exclusion of a group from that forum on the religious content of their message. Justice White dissented on the grounds that the *Sherbert* test was not satisfied, since the burden on the respondents' free exercise was minimal, in that they could easily hold their meeting a block or two from campus. *Id.* at 288-89 (White, J., dissenting).

91 450 U.S. 707 (1981).

sisting that the government carve out exceptions to facially neutral statutes for those who raise free exercise objections.<sup>92</sup> To resolve the conflict, he urged that each clause be applied narrowly, as urged by Justice Harlan in his dissent in *Sherbert*: the Court would uphold any statute motivated by a valid secular interest, applied evenhandedly and directed at conduct, rather than belief or expression, against any free exercise claim.<sup>93</sup>

Recent establishment clause cases have evidenced dissent from prevailing law. The only establishment clause case in which the Supreme Court spoke with substantial unanimity was *Larkin v. Grendel's Den, Inc.*,<sup>94</sup> which struck down a Massachusetts statute permitting a church to veto the grant of liquor licenses to businesses within 500 feet of the church.<sup>95</sup>

On a vote of five to four, the Court in *Larson v. Valente*<sup>96</sup> struck down the Minnesota Charitable Solicitations Act, which exempted from its registration and reporting requirements any religious organization which received over half of its total contributions from its own members. The majority saw the statute as clearly preferring traditional religions as opposed to such groups as the Unification Church, and also found that it presented a clear risk of entanglement between religions and the government agencies charged with determining eligibility for favorable tax treatment.<sup>97</sup> The dissenters, on the other hand, found that the statute did not distinguish on the impermissible basis of the "brand of religion" espoused by a sect, but only upon the neutral ground of the "source of their contributions."<sup>98</sup> They would also defer to the legislative judgment that the danger of fraud is related to the percentage of funding coming from outside an organization's membership.<sup>99</sup>

92 "If Indiana were to legislate what the Court today requires—an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons—the statute would 'plainly' violate the Establishment Clause as interpreted in such cases as *Lemon* and *Nyquist*." *Id.* at 726 (Rehnquist, J., dissenting).

93 "Where . . . a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group." *Id.* at 724 (Rehnquist, J., dissenting).

94 459 U.S. 116 (1982).

95 Eight members of the Court found that the Massachusetts statute impermissibly delegated government power to churches. Justice Rehnquist disagreed, arguing that since prohibiting liquor licenses within 500 feet of a church or school would be permissible, to allow religious groups to, in effect, waive statutory protection in individual cases did not offend the establishment clause. *Id.* at 127-30 (Rehnquist, J., dissenting).

96 456 U.S. 228 (1982).

97 Religions subject to the statute had to register and provide information "much of which penetrates deeply into the internal affairs" of the church. An annual report required disclosure of total income and costs of management and fund-raising. The Attorney General could revoke the church's registration, and therefore its right to solicit contributions, if he "conclude[d] that the religious organizations spending 'an unreasonable amount' for management, general and fund-raising costs." *Id.* at 253 n.29.

98 *Id.* at 261-62 (White, J., dissenting). The Court had held that the fifty-percent rule "clearly grants denominational preferences." *Id.* at 246. While not framed in terms of the content of the church's doctrine, the statute favored "'well-established churches' that have achieved strong but not total financial support from their members . . . [over] 'churches which are new and lacking in a constituency.'" *Id.* at 247 n.23, quoting *Valente v. Larson*, 637 F.2d 562 (8th Cir. 1981).

99 456 U.S. at 262-63 (White, J., dissenting). The Court held that the source of the contribution had little to do with the possibility of fraud. Any connection would seem to be the assumption that members would more closely police their organization where most of its money had come from their

The Court largely ignored the *Lemon* test in *Marsh v. Chambers*,<sup>100</sup> upholding the practice of the Nebraska legislature of opening each legislative day with a prayer delivered by a paid permanent chaplain. The practice was validated in light of the "unambiguous and unbroken history of more than 200 years" of such practices without any establishment clause challenge.<sup>101</sup> But Justices Brennan and Marshall, dissenting, noted that such a practice could not stand under the "settled doctrine" of *Lemon*.<sup>102</sup>

A more significant 1983 decision was *Mueller v. Allen*,<sup>103</sup> in which a sharply divided Court upheld a Minnesota statute which allows state taxpayers to deduct a limited amount of any expenses incurred in providing dependents with "tuition, textbooks and transportation" for elementary or secondary school.<sup>104</sup> The Court distinguished the New York statute struck down in *Nyquist*,<sup>105</sup> pointing out that the Minnesota provision makes deductions available to parents of both public and private school students, and also grants the financial benefit directly to the parent rather than the school.<sup>106</sup> The Court suggested that the *Lemon* test might not be as definitive as prior opinions had suggested: "our cases have also emphasized that it provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges."<sup>107</sup> Four dissenters, however, found that the Minnesota program failed the primary effect prong of the *Lemon* test. Since a large majority of those who would take advantage of the tax deduction would be parents of children in religious schools, and since the deduction was worth much less to parents of public school students, whose school-related expenses were far less, the dissenters argued that the primary effect of the program was to aid religion.<sup>108</sup>

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own pockets. However, not only did the statute fail to single out churches not controlled by votes of their members, it went so far as to create exemptions for some traditional churches without membership voting rights. *Id.* at 250 n.25.

100 463 U.S. 783 (1983).

101 *Id.* at 792. The Court invoked history not only to establish the legitimacy of opening legislative sessions with a prayer, but also to justify the particular features criticized by the respondent: that the state paid the chaplain and retained the same chaplain (representing a single denomination) for sixteen years. *Id.* at 793-95.

102 In fact, the practice would fail each of *Lemon's* three tests: "[t]hat the 'purpose' of legislative prayer is preeminently religious rather than secular seems . . . to be self-evident . . . . The 'primary effect' of legislative prayer is also clearly religious . . . . [And] the process of choosing a 'suitable' chaplain . . . involves precisely that sort of supervision that agencies of government should if at all possible avoid." *Id.* at 797-99 (Brennan, J., dissenting).

103 463 U.S. 388 (1983).

104 "The deduction is limited to actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools. A deduction may not exceed \$500 per dependent in grades K through 6 and \$700 per dependent in grades 7 through 12." *Id.* (citing MINN. STAT. § 290.09 (1982)).

105 Committee for Public Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973). See *supra* note 36 and accompanying text.

106 463 U.S. at 398-99. Although the deduction would be useless to the parents of public school children insofar as it makes ordinary tuition deductible, other deductible items which would be of some importance to such parents would include costs of school supplies (from pencils and notebooks to calculators, art supplies and physical education equipment), summer school tuition, tuition for public schooling outside the student's residence district, and the costs of some private tutoring services. *Id.* at 391 n.2.

107 *Id.* at 394. The Court then analyzed the case under the *Lemon* test, finding that the statute satisfied all three parts.

108 *Id.* at 408-11 (Marshall, J., dissenting). The dissenters argued that "[t]he statute is little more

If *Mueller* was seen by many as a hint that the *Lemon* test was no longer in vogue, then *Lynch v. Donnelly*<sup>109</sup> was taken to be a clear signal that the three-part analysis would soon be explicitly abandoned. In upholding the inclusion of a nativity scene in a city-sponsored Christmas display, the five-member majority, although proceeding through a *Lemon*-type analysis, introduced the analysis by noting merely that "we have often found [the *Lemon* test] useful" and stating that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."<sup>110</sup> Needless to say, the dissent strongly reaffirmed the vitality of the test as the determinative factor in any establishment clause case.<sup>111</sup>

These signs of dissatisfaction with the *Lemon* test, and the near uselessness of the test in predicting the outcome of any but the most one-sided establishment clause dispute, led observers to expect that the Court's acceptance of several church-state cases for the 1984-85 term indicated imminent doctrinal change. When the cases were decided, however, no such change occurred. *Lemon* was again reaffirmed, while once again several dissenting justices pointed to the deficiencies of the prevailing test.

The outcome in *Wallace v. Jaffree*<sup>112</sup> was unsurprising. An Alabama statute setting aside a daily period of silence "for meditation or voluntary prayer" in public schools was found unconstitutional. Clear evidence indicated that the phrase "or voluntary prayer" had been added to the statute in an effort to circumvent prior court decisions and reintroduce prayer into the public schools. The explicit endorsement of the *Lemon* test as the basis of establishment clause inquiry, however, was somewhat surprising. Despite the hints of dissatisfaction in *Mueller* and *Lynch*, the Court reaffirmed the vitality of the three-part test, and held that the Alabama statute, being religiously motivated, failed the secular purpose prong of the test.<sup>113</sup>

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than a subsidy of tuition masquerading as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses." *Id.* at 408-09. In 1978-79, out of 815,000 public school students in Minnesota, only the 79 students who attended school outside their residence districts were charged tuition. *Id.* at 405.

109 104 S. Ct. 1355 (1984).

110 *Id.* at 1362. While the Court, as in *Mueller*, did apply the *Lemon* test, and found the creche permissible under it, that part of the opinion is clearly secondary to the Court's discussion of history and its "countless . . . illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Id.* at 1361. Going beyond the lukewarm endorsement of the *Lemon* framework in *Mueller*, here the Court was very explicit in stating that application of *Lemon* is not essential to establishment clause analysis: "In two [prior] cases, the Court did not even apply the *Lemon* 'test.'" *Id.* at 1362.

111 Although I agree with the Court that no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems . . . I fail to understand the Court's insistence upon referring to the settled test set forth in *Lemon* as simply one path that may be followed or not at the Court's option . . . [E]ver since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of Establishment Clause analysis.

*Id.* at 1371 n.2 (Brennan, J., dissenting).

112 105 S. Ct. 2479 (1985).

113 *Id.* at 2490. In applying the *Lemon* test and declaring that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion," the Court went so far as to cite the dissenting opinions in *Lynch* as authority. *Id.* at 2490 n.41.

Yet the Court was hardly of one mind. Three dissenting Justices either ignored *Lemon*<sup>114</sup> or criticized its application,<sup>115</sup> and Justice O'Connor concurred in the judgment but rejected the Court's *Lemon*-based reasoning.<sup>116</sup> Justice Powell, on the other hand, concurred "to express additional views and to respond to criticism of the three-pronged *Lemon* test."<sup>117</sup> His response, however, was hardly a strong endorsement. He insisted that the *Lemon* test was "the only coherent test a majority of the Court has ever adopted,"<sup>118</sup> more of an argument for stare decisis than for the virtues of *Lemon*.

*Aguilar v. Felton*<sup>119</sup> presented essentially the same division of the Justices. The Court held unconstitutional New York City's program of paying public employees to teach special education classes in secular subjects to low-income students in religious as well as public schools.<sup>120</sup> The state supervision necessary to insure that the program was not used to advance religion, and was therefore in compliance with the second step of the *Lemon* test, "inevitably results in the excessive entanglement of church and state,"<sup>121</sup> and thus the program failed to satisfy the third step of the test. Four Justices dissented, taking issue not only with the outcome, but also with the continued use of the *Lemon* test, or at least with "the Court's obsession with [its] criteria."<sup>122</sup>

The great expectations (or fears) with respect to the religion clause cases of the 1984-85 term proved unwarranted. The decisions, most notable not for what the Court did, but rather for what it failed to do, left the jurisprudence of the religion clauses largely where it stood at the start of the term. *Lemon* remains the law for establishment clause cases; its recent reaffirmation leaves it somewhat more secure than it seemed

114 Chief Justice Burger dismissed the Court's reliance on *Lemon* as "a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." *Id.* at 2507 (Burger, C.J., dissenting).

115 Justice Rehnquist discussed *Lemon* only after a lengthy exposition on the "original intent" behind the establishment clause. Calling for abandonment of *Lemon*, at least as a binding test, he argued that "[t]he true meaning of the Establishment Clause can only be seen in its history." *Id.* at 2520 (Rehnquist, J., dissenting).

116 *Id.* at 2496-2505 (O'Connor, J., concurring). Her alternative is discussed at length *infra* notes 140-44 and accompanying text.

117 *Id.* at 2493 (Powell, J., concurring).

118 *Id.* at 2494. "Lemon v. Kurtzman was a carefully considered opinion of the Chief Justice, in which he was joined by six other Justices. *Lemon*'s three-pronged test has been repeatedly followed." *Id.* at 2494 n.5 (citation omitted).

119 53 U.S.L.W. 5013 (July 1, 1985).

120 The local program carried into effect Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (1982). For nearly twenty years the program had provided remedial reading, remedial mathematics, and English as a second language and related guidance services, to "educationally deprived" children in low-income areas. In 1981-82, 13.2 percent of children receiving such funds in New York were enrolled in private schools, the overwhelming majority of which were religious. *Aguilar*, 53 U.S.L.W. at 5014.

121 *Id.* at 5015. The Court did not, in any detail, explain why state supervision of its own employees constitutes excessive entanglement. *See id.* at 5020 (O'Connor, J., dissenting): "New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes." In the companion case of *Grand Rapids School Dist. v. Ball*, 53 U.S.L.W. 5006 (July 1, 1985), the Court held, with the concurrence of Justice O'Connor and Chief Justice Burger dissenting, that a Title I program which provided public funds to full-time private school teachers who were to provide the mandated secular courses was invalid.

122 *Aguilar*, 53 U.S.L.W. at 5018 (Burger, C.J., dissenting).

after *Mueller* and *Lynch*. Yet the test is no easier to apply, and the seeds of change remain alive in the opinions of several Justices. The Court has several religion cases before it during its current term. While it is entirely possible, perhaps probable, that these cases will advance first amendment analysis no further than did the 1984-85 term, it is also possible that the persistence of the *Lemon* test is best explained by the absence of attractive alternatives. There may, in fact, be no acceptable alternatives, either for *Lemon* or for the *Sherbert* approach to free exercise cases, as long as the starting point for analysis remains the contention that the end sought is "separation" of church and state. But an alternative approach does exist, and its essence has been put forward in recent opinions of Justice O'Connor.

### III. The Proper Ends of the Religion Clauses: Separation or Liberal Neutrality?

To agree with Justice Powell that the *Lemon* test has been the only framework for establishment clause analysis consistently endorsed by the Supreme Court<sup>123</sup> is, of course, not to agree that it is necessarily the best possible approach. *Lemon*, however, with its "Catch-22" juxtaposition of requirements that a state neither act with the primary effect of aiding religion, nor entangle itself with religion by closely monitoring government programs involving religious groups to assure that their effects are secular, may well be the best possible way of enforcing an establishment clause thought to have as its goal the separation of church and state.

*Lemon* is, no doubt, a faithful elaboration on the rationale (if not the holding) of *Everson*, the starting point of modern religion clause analysis: the end to be sought is the Jeffersonian ideal of a "wall of separation."<sup>124</sup> Consequently, any challenge to *Lemon* must go back to this first step to determine whether separation is the proper goal to be sought. Although much has been written on this issue, most of the discussion has focused on two criticisms of separation: First, that it is less desirable than some form of "accommodation,"<sup>125</sup> or second, that it was not actually the goal sought by most or all of the framers of the Constitution.<sup>126</sup>

Less frequent, yet much more fundamental, is the contention that separation, whether desirable or undesirable, intended by the framers or

123 See *supra* notes 117-18 and accompanying text.

124 See *supra* notes 5-7 and accompanying text. This is not to say that Chief Justice Burger intended *Lemon* to strongly endorse "separation" as an ideal. Indeed, he rejected "total separation" as "not possible in an absolute sense." But the wall is to be maintained "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." 403 U.S. at 614.

125 [T]he Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values . . . "[W]hen the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

*Lemon*, 403 U.S. at 664-65 (White, J., dissenting).

126 Justice Rehnquist, dissenting in *Jaffree*, concluded "that the Establishment Clause . . . forbade establishment of a national religion, and forbade preference among religious sects or denominations . . . [I]t did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion." *Jaffree*, 105 S. Ct. at 2516 (Rehnquist, J., dissenting).

not, is quite simply impossible in the late twentieth century. A concept easily understood in an overwhelmingly Protestant eighteenth century society, and one which once accepted would not be difficult to implement in that same society, has neither of those attributes today. Still, judges on both sides of religion clause issues base their position on their understanding of what eighteenth century minds really intended. This includes judges who, apart from the religion clauses, would not be caught dead robing themselves in "originalist" trappings.<sup>127</sup>

Something approaching a "wall of separation" was quite possible in post-Revolutionary America. Government activity was minimal by today's standards, particularly at the federal level, the only level originally addressed by the first amendment. It was, therefore, far less likely to invade areas of religious significance. At the same time, America was a Protestant nation. Even Americans who held strong religious convictions belonged to churches with theological roots relatively compatible with the view that religion was properly a private matter between the believer and his God.<sup>128</sup> This is not to say that community welfare was irrelevant to the religious believer of the time, nor that government was to be avoided as a tool for the propagation of the faith. Protestant religious establishments were common at the state level in the early days of the republic.<sup>129</sup> But in a religious tradition which emphasizes the direct relationship between God and the individual, and which draws heavily on the thought of Augustine, who expounded on the distinction between the "City of God" and the "City of Man," the idea that a wall of separation was at least possible, if not ideal, would not have been alien.

Over the past two centuries, however, each of the two cities has greatly expanded its borders. Religion no longer asserts merely the right to believe and worship, but also regards as essential the obligation to create a better world. At the same time, government no longer considers its sole obligation to be keeping peace so that individuals may fulfill themselves, but actively works to facilitate the individual's welfare. Consequently, no boundary exists along which to erect a wall of separation.

The rise of the "social gospel" in nineteenth-century Protestantism and the integration into American society of large numbers of Catholics

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127 Justice Brennan criticized the *Lynch* majority for "a fundamental misapprehension of the proper uses of history in constitutional interpretation." *Lynch*, 104 S. Ct. at 1382 (Brennan, J., dissenting) and, as to the specific question before the Court, stated that "[t]he intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern . . ." *Id.* at 1383. He then marshalled his own historical sources to argue that: "For those who authored the Bill of Rights, it seems reasonable to suppose that the public celebration of Christmas would have been regarded as at least a sensitive matter, if not deeply controversial." *Id.* at 1385.

128 Even though most of English-speaking America was subject to some degree of Protestant establishment prior to the American Revolution, the religions themselves were primarily centered on the direct relationship between God and the believer. The Great Awakening of the 1730s and 1740s stressed individual conversion, choice and rebirth. See generally M. MARTY, *PILGRIMS IN THEIR OWN LAND* 107-28 (1984); *Everson*, 330 U.S. at 23-24 (Jackson, J., dissenting) ("Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values . . . . It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.").

129 See generally M. MARTY, *supra* note 128, at 53-91.

and Jews, whose religious traditions were more closely related to a sense of community than to individualism, insured religious involvement in government affairs.<sup>130</sup> After all, what other institution could possibly act on a necessary scale to effectively promote social welfare?<sup>131</sup> The simultaneous expansion of government concerns assured government involvement in what was once the exclusive province of religion or individual conscience. After all, how could such "secular" goals as equality and a decent life for all be insured without an attempt to educate and to create a sense of moral obligation and responsibility, tasks once primarily associated with religion as transmitted either by churches or families?<sup>132</sup>

The definition of religion has itself expanded. In the relatively comfortable, overwhelmingly mainstream Christian America of the nineteenth century, religion was theism; more than that, it was familiar Judeo-Christian theism. The Supreme Court could, at the time, dismiss without serious analysis the Mormon contention that polygamy was a sincere religious practice.<sup>133</sup> However, not only have traditional religions expanded the scope of their concerns, new religions have proliferated, some bearing little resemblance to familiar faiths.<sup>134</sup> Together these developments make it much easier to think of "religion" as a term designating any coherent set of beliefs about ultimate questions.<sup>135</sup> That step completes the breakdown in the "wall of separation." Although religion has become the state in other times and other places, it is possible that for many today the state has become religion.<sup>136</sup>

130 For a discussion of the integration of Catholic and Jewish immigrants into the United States, see *id.* at 271-94. The "social gospel" aspects of Protestantism are discussed *id.* at 337-371. For a discussion of Catholic approaches to social issues within the government system of the United States, see generally C. CURRAN, *AMERICAN CATHOLIC SOCIAL ETHICS: TWENTIETH-CENTURY APPROACHES* (1982).

131 Although Catholic social ethics, for example, have long placed great value on the principle of subsidiarity—that decisions should be made by the smallest social unit capable of dealing with a problem—in the twentieth century, the smallest unit is often government. CURRAN, *supra* note 130, at 26-91.

132 It is interesting to note the shift in emphasis of Marty's history of religion in America. While most of his discussion of pre-twentieth century religion concerns the struggle of religions to establish themselves in the United States, to convert individuals, etc., the final third of the book, dealing with the twentieth century, deals at great length with church involvement in various social movements of the century. M. MARTY, *supra* note 128.

133 "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter." *Davis v. Beason*, 133 U.S. 333, 342 (1890).

134 See M. MARTY, *supra* note 128, at 450-58.

135 Contrast the narrow limitation of religion and its duties in the nineteenth century Mormon cases, *Davis* and *Reynolds*, with the open-ended approach of *United States v. Seeger*, 380 U.S. 163, 174-75 (1965), where the Court stated:

Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.

136 Theologian Hans Kung, developing his argument in favor of the existence of God, begins by demonstrating that ultimately the question which must be faced is not a choice of faith or reason, but rather the question of what kind of faith. Invariably, something takes the functional place of God in the world view of the atheist, whether it be science, man, or the state. The atheist, therefore, has his own religion, albeit not theistic in the usual sense of the word. H. KUNG, *DOES GOD EXIST?* (1980).



"Separation" has been unsatisfactory as a practical test because it is unrealistic as a goal. We must find a new starting point for religion clause analysis. Opponents of the *Lemon* test have frequently suggested "accommodation" as an alternative.<sup>137</sup> But while this term recognizes the inevitable intermingling of the religious and the secular, it provides no basis for developing a clear set of standards. To many, "accommodation" seems to mean nothing more than a judicial attitude of disfavoring establishment clause claims, and favoring those made under the free exercise clause. "Accommodation" seems to be less of an alternative to the *Lemon* approach than a mindset with which to apply that approach.

Some form of "neutrality" would seem to be the only possible starting point. Neutrality connotes lack of favor or disfavor, but it does not connote total noninvolvement as does separation. A judge or an umpire is neutral as between the participants, but he does not separate himself from them. Of course, neutrality must be precisely defined if it is to be of any practical value as a standard.

The most prominent of the specific suggested "neutrality" tests is that put forward by Professor Kurland. His test requires that the language of the statute be facially neutral, that is, the language must not categorize for either burdens or benefits based upon religion.<sup>138</sup> This test has some appeal, but it has not been used by judges, possibly because of an unease about church-state involvement even without an explicit statutory classification.<sup>139</sup> Justice O'Connor, in recent separate opinions, has put forward a test which finds a somewhat different meaning in the concept of neutrality. She would ask whether government was, by the practice in question, "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."<sup>140</sup> Like the *Lemon* test, this approach focuses on the purpose and effect of government action. Unlike *Lemon*, however, the mere existence of significant benefits or detriments to religion will not end the inquiry. The test does not insist on separation. Rather, it goes on to examine whether particular benefits or burdens can be seen as messages of favoritism violating the standard of neutrality.

Such a test, more clearly than Professor Kurland's, would go beyond the text of the statute in question. Explicit religious classification would not always be necessary or sufficient to constitute a constitutional violation. The ultimate question would be whether a message of approval or disapproval is being conveyed.

One of the most striking aspects of this test, considering its source, is the compatibility of the test with the definition of liberalism put forward by Ronald Dworkin, one of the most prominent self-described lib-

137 See, e.g., *Lynch v. Donnelly*, 104 S. Ct. at 1359 ("[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions"). See also *Zorach v. Clauson*, 343 U.S. 306 (1952).

138 Kurland, *supra* note 81.

139 This is most obvious in recent free exercise cases. In *Sherbert*, *Yoder* and *Thomas*, for instance, the uniform application of a facially valid statute which did not classify by religion was found to violate the Constitution.

140 *Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring).

eral legal thinkers of our time. Dworkin's definition of the core principle behind liberalism is that government must be neutral as to the question of what constitutes the good life.<sup>141</sup> While government may, and often should, prohibit people from acting to the detriment of others, in the absence of such harm it may not endorse or condemn a chosen way of life or its beliefs, expressions, or even actions which do not harm others.<sup>142</sup> This principle of liberal neutrality seems to be at the core of the suggested religion clause analysis of Justice O'Connor, who is commonly regarded as one of the most conservative members of the Court.<sup>143</sup>

The first amendment, in its entirety, may be seen as the central statement of constitutional commitment to liberal neutrality. It protects those things which most directly relate to an individual's choice of values: beliefs, expression of beliefs, and at least some practices closely associated with those beliefs. Although most commentators focus on one clause at a time, which has led to separate bodies of legal doctrine concerning freedom of speech and freedom of religion, the connection between these concerns of the amendment is clear. The connection becomes even more clear as the boundaries of the sacred beliefs protected by the religion clauses and the secular beliefs protected by the speech clause disappear.

Is it possible to build upon this concept of liberal neutrality to create a more coherent and satisfying body of law under the religion clauses? Since this concept of the absence of government endorsement has only been put forward in a handful of separate opinions by Justice O'Connor, its consequences have yet to be fully explored. Furthermore, with the concept still largely undeveloped, it is possible, if not likely, that there will be significant disagreement about its proper application even among those who find it initially attractive. The following analysis of liberal neutrality does not purport to be a prediction of how Justice O'Connor's test would be applied if adopted by the Court, or even of how Justice O'Connor would apply it in particular settings. Rather, it attempts to develop her insight identifying the absence of government endorsement as the key requirement of the religion clauses into a more elaborate system of analysis, one which would be an attractive alternative to the separationist-based tests currently in use.

#### IV. Liberal Neutrality and the Absence of Government Endorsement: An Analytical Framework

The concept of liberal neutrality expressed in the requirement that government withhold endorsement of religion or any specific religion provides an attractive alternative to the concept of separation as the basis of religion clause analysis. When neutrality among and legal equality of value systems becomes the goal of the inquiry, we can abandon the foun-

<sup>141</sup> See generally R. DWORKIN, A MATTER OF PRINCIPLE 181-204 (1985).

<sup>142</sup> However, where harm to others is threatened, it is not outweighed by a mere generalized right of "liberty." See R. DWORKIN, TAKING RIGHTS SERIOUSLY 266-78 (1978).

<sup>143</sup> For an overview of Justice O'Connor's first four years on the Supreme Court, see Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389 (1985).

·dation of separationism, that all contact between church and state is suspect and to be only reluctantly tolerated when absolutely unavoidable.

Liberal neutrality will often tolerate, if not require, contact and co-operation between government and religion. Liberal neutrality is ultimately based upon the principle that all are entitled to equal treatment by government. In other constitutional contexts, it has become clear that the ultimate goal of equality may, in the short term, require unique treatment of a group or an individual.<sup>144</sup> While this has been most obviously so with regard to issues involving race, there are numerous other contexts in which government aid will be given to assure the full and equal participation of a group or their ideas in American democracy. Government provides special educational opportunities for different types of students,<sup>145</sup> regulates broadcast media by allocating frequencies,<sup>146</sup> supports the arts,<sup>147</sup> and places some restrictions on political campaign activity.<sup>148</sup>

Each of these instances of support can be labeled as "special treatment." In light of the equal protection clause and, where support of an idea is involved, the first amendment, one might ask why the government may grant such benefits to a particular group or idea. Does the ideal of equal protection require the absence of any special treatment? Does the free market of ideas created by the first amendment necessarily accept the likelihood that the market will reject some of them, and such ideas should "go out of business?"

At first glance, such a conclusion may seem proper and support the concept that government may not prefer any set of values over another. Neutrality, then, leads to "separation" of government from the dissemination of ideas, even in the absence of the particular history behind the religion clauses. Doesn't financial support of the existence of a viewpoint violate neutrality by indicating government support of that viewpoint? Doesn't neutrality imply indifference concerning the continued existence of a viewpoint?

Ronald Dworkin has argued that aid to a particular group or to those presenting a particular message need not carry with it the message that the recipient group or idea is favored over its competitors.<sup>149</sup> Such aid may result from a recognition that the recipient of the aid has a right to

144 See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (race may sometimes validly be a factor in government decision-making, where the purpose is to redress existing inequalities); *Califano v. Webster*, 430 U.S. 313 (1977) (sex may sometimes be a valid classification if necessary to serve important government objectives).

145 This is so in a number of ways, including affirmative action in admissions, see *Bakke*, 438 U.S. 265, and remedial education for educationally deprived students, see *Aguilar v. Felton*, 53 U.S.L.W. 5013 (July 1, 1985). See also *supra* notes 119-21 and accompanying text.

146 See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (citizen groups have standing to challenge license renewal for radio or television station).

147 Government grants through such institutions as the National Endowment for the Arts involve choices of which messages to subsidize. See DWORKIN, *Can a Liberal State Support Art?*, in *A MATTER OF PRINCIPLE* 221-33 (1985). The impact of government funding on the content of public television has long been a subject of concern. See, e.g., Wicklein, *The Assault on Public Television*, COLUM. JOURNALISM REV., Jan.-Feb. 1986, at 27-34.

148 See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

149 Dworkin defends affirmative action in admissions to higher education. See DWORKIN, *Bakke's Case: Are Quotas Unfair?* in *A MATTER OF PRINCIPLE* 293-303 (1985).

exist and, in fact, enriches the overall community by its presence.<sup>150</sup> Just as access to a public forum for delivery of a message does not imply that government endorses the particular message involved,<sup>151</sup> aid provided on a basis which implies nothing more than equality does not offend liberal neutrality.

It might be argued that while in most instances government aid to those promoting a particular message does not constitute an impermissible endorsement of that message, the establishment clause requires a special distance between government and religious messages. But, as discussed above, such a view becomes far less tenable where the concept of religion is no longer defined as clearly and narrowly as it was in the eighteenth century, and where the scope of government activity has simultaneously become much more broad. The role of government in education is particularly significant.

When government assumes responsibility for education, it inevitably enters the business of promoting values and beliefs. This is also the case, although less obviously, when social welfare functions convey messages about the community's responsibilities to its members, when criminal statutes label practices as intolerable, and in a number of other government choices of one set of values over another. The traditional separationist view is that this presents no problem, since all of these value choices by government are based on secular considerations, rather than religious concerns.

Secular concerns are no longer easily distinguished from religious concerns. Religious concerns are no longer, to the extent which they ever were, limited to concerns about the believer's relationship with a single, transcendent God easily recognizable as such in the Judeo-Christian tradition. Religion can be, and is, recognized to encompass any coherent set of beliefs about ultimate concerns.<sup>152</sup> This being the case, the traditional separationist view comes perilously close to becoming itself an establishment of "religion." The favored "religions" are those whose position is that ultimate values reside in the welfare of the community (however defined).<sup>153</sup>

With government more clearly in the business of endorsing values, and with religion now understood as including belief systems ultimately valuing human welfare, separation, if pursued in a way appropriate to the eighteenth century, loses its neutrality. Whether consciously or not, government endorses the view that not only is the temporal welfare of the community a value, but it is the ultimate value, and the only value entitled to government recognition as valid. Here, as elsewhere in constitu-

150 See generally DWORKIN, *supra* note 147.

151 In fact, the government may be required to provide such access for speakers whose message the government openly deplores. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

152 See *United States v. Seeger*, 380 U.S. 163 (1964). See also H. KUNG, *supra* note 136.

153 See, e.g., Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177. This concept is not limited to nonjudicial commentators. Justice Black was concerned that not allowing a state to keep all views concerning the origins of man out of the public school curriculum might be antireligious rather than merely nonreligious. See *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring).

tional law, a means once appropriate to achieve a desired end has now become antithetical to that end.

Much of the recent debate over the role of "original intention" in constitutional analysis is largely deceptive, due to the fact that multiple intentions coexist, not only in a group of minds, but within a single mind itself. One prescribing a legal rule usually has in mind an intended end and an intended means thought to be consistent with achieving that end. The rule may not, however, make this means-end relationship clear, possibly because the connection was so obvious in the mind of the lawmaker that it was not thought to require elaboration.<sup>154</sup>

However times change, and the world may change in ways which make a means which was once most appropriate to achieving the desired end not only ineffective, but actually destructive of that end. At that point, it is simply impossible to implement the "original intention" of the rule-maker in its entirety. Intended means must be sacrificed to the intended end, or vice versa. Clearly, ends should usually be given greater weight than means in making these choices. It is still possible, of course, to sincerely argue over which of two now-inconsistent intentions was meant to be the end and to control the other. But understanding that to be the nature of the debate makes much more clear what is actually at stake. Failure to understand the complexity of "original intention" itself leads to nothing more than futile shouting over whether intention is important or controlling. The question of which intention to follow is a more accurate and helpful way to frame many of these arguments.<sup>155</sup>

*Everson* was surely correct in its conclusion that separation of church and state was desired by the framers of the first amendment.<sup>156</sup> But that is the beginning, not the end, of the inquiry. Was separation thought of as an end, or as a necessary means to achieve neutrality? This is the key question, for if the twentieth century has made separation an obstacle to neutrality, one or the other must be sacrificed.

While there is strong evidence of separationist sentiment among the framers, there is certainly no significant evidence that separationism was anything more than a means of achieving neutrality. There is nothing to indicate that government hostility to religion was considered desirable. Indeed, the free exercise clause is clear evidence that such hostility was not even considered permissible.<sup>157</sup> When government is limited, and when religion is commonly considered as relatively unconcerned with those matters central to government, separationism is a logical and possibly the most effective way to achieve neutrality. But when government clearly promotes values of some sort, and religion may be thought to include what were once considered secular concerns, that compatibility is

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<sup>154</sup> See the discussion of this conflict between "abstract" and "concrete" intentions in R. DWOR-KIN, *A MATTER OF PRINCIPLE* 48-55 (1985).

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* notes 5-7 and accompanying text. See also M. MARTY, *PILGRIMS IN THEIR OWN LAND* 131-66 (1984). "A . . . revolution occurred in the way people conceived of church and state, the religious and civil realms. For ages they had been somehow united and now they were, by conscious choice of church and state, somehow to be separated." *Id.* at 131 (emphasis in original).

<sup>157</sup> See *supra* notes 43-74 and accompanying text.

destroyed. The first amendment, as a whole, indicates that neutrality must be recognized as the proper analytical goal, rather than separation.

How should liberal neutrality, once chosen as the standard for religion clause analysis, be applied? To what extent would specific rules and outcomes differ from current approaches? With some assurance, we can take as our starting point one rule on which separationism and liberal neutrality are in complete accord. Government may not favor one religion over another. This proposition is not disputed by any serious first amendment analyst.<sup>158</sup> The first point at which at least some<sup>159</sup> would dispute separationism is its next premise, that government may not favor all religion over irreligion.<sup>160</sup>

Case law unanimously and unambiguously supports this proposition, and the fact that anyone seriously contests it initially would seem strange. It would be easy to label such arguments as merely eccentric, yet there may be something to be learned from those who are troubled by the proposition that religion in general may not be favored. Liberal neutrality would, at the outset, agree that religion may not be favored over irreligion. After all, each is a value system, a way of life, and one should not be labeled as inferior to the other. But implicit in the criticism of such a rule is one fact which must be squarely faced. When the barriers between "religion" and "irreligion" have blurred to the extent they now have, when "irreligion," or at least certain forms of it, may be seen as having all the essential aspects of a religion,<sup>161</sup> it is also true that irreligion may not be favored over religion. To favor religion over irreligion is to actually favor one religion (defined broadly) over another. Liberal neutrality would reject this as strongly as would separationism. So neutrality runs both ways, to favor irreligion over religion must be guarded against as well. Much of the criticism of the principle that government may not favor religion seems based upon the premise that to refrain from favoring religion is not neutrality, but rather favoritism toward the religion of irreligion. To appreciate this is not necessarily to accept its conclusions, but it does call for heightened sensitivity to the possibility of government discouraging belief.

Liberal neutrality provides that government may not endorse one set of religious beliefs over another, or over irreligion. A somewhat more

158 Those who would most narrowly apply the establishment clause concede that at the very least it stands for the proposition that one religion may not be favored over another. See, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479, 2508-20 (1985) (Rehnquist, J., dissenting); see also Corwin, *supra* note 78, at 10-11; Toscano, *supra* note 153, at 190.

159 Including the authors cited *supra* note 158.

160 See M. MARTY, *supra* note 156, at 131-66. Some, including Benjamin Franklin, saw the withdrawal of support for individual sects as a step on the road toward constructing a new "public religion" combining basic Christian principles with civil republican virtues. "The enlightened founders were eager to produce a universal creed that they could throw like a tent over the diverse church religions." *Id.* at 156. Church leaders could, at least in part, endorse such a view. America's leading Catholic cleric of the revolutionary era, John Carroll, stated that "general equal toleration, by giving a free circulation to fair argument, is the most effectual method of bringing all denominations of Christians to a unity of faith." *Id.* at 146. But the creation of a public religion was clearly not desired by all. Jefferson and Paine, for example, favored "completely individual religion," and would hold civic virtues and religious beliefs separate. *Id.* at 154-55.

161 See H. KUNG, *supra* note 136.

concrete way of putting this might be to inquire whether the statute or government belief in question is intended to cause people to adhere to a particular set of beliefs, or is likely to do so.<sup>162</sup> However, putting the question in this way, in light of the already discussed recognition of irreligion as itself a religion, points to the central difficulty in applying liberal neutrality. Can't almost any government program be seen as promoting one set of values (one "religion") to the detriment of competing sets of values ("religions")? Are we not forced, then, to categorize beliefs as permissible and impermissible as objects of government favor, and must we then return to the present language of labelling those permissible beliefs as nonreligions and calling for separation of government from those impermissible belief systems which we choose to label "religious"? This problem can be solved by categorizing religious beliefs.

Government must choose values. And the religion clauses indicate that some value choices are impermissible. But rather than talk of whole systems of values as permissible (nonreligious) or impermissible (religious), it is more helpful to look at the package of beliefs which typically make up complete value systems. It is common for religions to divide the duties which they impose on their adherents into two categories. Although possibly of equal importance, these categories are distinct in that they distinguish to whom the believer's duty runs. On the one hand, religions commonly expect certain types of activity toward others in the community in order to improve the temporal welfare of particular others or of the community, however defined.<sup>163</sup> On the other hand, religions typically impose duties, either of belief or activity, which transcend temporal concerns of community welfare.<sup>164</sup> Although there is a connection between the two types of requirements (for example, duty toward others may be seen as largely derivative of duty to the will of God), it is possible to meaningfully classify most religious beliefs as either relating directly to temporal human welfare or to something transcendent.<sup>165</sup>

Government has no choice but to act to protect the temporal welfare of its citizens. To this extent, its activity must intrude on issues also dealt with by religion, when religion imposes a duty to others in the community. While acts of the government often will be equally consistent with any religious or irreligious philosophy, they will not always be so. Different religions and philosophies may have different definitions of human welfare, even putting aside any other worldly concerns. When government chooses to promote human welfare in a way which some, but not

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162 Professor Choper suggests the following standard for analyzing religion clause cases: "The Establishment Clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs." Choper, *supra* note 83, at 675.

163 See generally C. CURRAN, *AMERICAN CATHOLIC SOCIAL ETHICS* (1982). The fundamental religious laws of the Judeo-Christian tradition, the Ten Commandments, contain seven which are directly concerned with conduct toward others, prohibiting murder, theft, deception, adultery, covetousness, and disrespect for parents.

164 The first three of the Ten Commandments deal with duties owed directly to God: exclusive worship, respect for the name of God, and observance of the Sabbath.

165 The Supreme Court noted the distinction between kinds of religiously imposed duties in *Stone v. Graham*, 449 U.S. 39, 41-42 (1980). See *supra* notes 41-42 and accompanying text.

all, philosophies would argue is not promotion of welfare at all, isn't government endorsing one set of beliefs, and violating liberal neutrality? And if that is so, isn't it clear that liberal neutrality is as impossible a goal as separation?

Liberal neutrality requires that we distinguish government acts which influence temporal human welfare from those that do not. When government acts to prohibit murder, or feed the hungry, or to pursue temporal human welfare in any number of ways, it does not violate liberal neutrality. This is so for several reasons. These acts, both individually and in the aggregate, are consistent with a number of different philosophies rather than only one. No message is sent by government that it agrees or disagrees with any religious view as to why human welfare should be promoted, in general or in any particular way. Everyone recognizes that it is legitimate for government to seek the community's view of its own temporal welfare, and also that each citizen is free to support his own view of the good society, regardless of the philosophy upon which that view is based.

The first qualification which must be made in the principle of liberal neutrality is this: government may influence or attempt to influence, without running afoul of the religion clauses, its citizens' beliefs insofar as those beliefs relate to what constitutes temporal human welfare.<sup>166</sup> Thus government can send clear messages that murder is bad, that racial equality is good, and that feeding the hungry makes for a better society. Only where government's definition of temporal human welfare approaches the irrational will such a government act be suspect.

The types of beliefs which government must remain neutral toward are those which go beyond temporal human welfare. If the last seven of the Ten Commandments are concerned with temporal human welfare, and may, therefore, be largely enacted into law,<sup>167</sup> the first three may clearly not be so adopted. These concerns of religion include the definitions of which values are ultimate, and underlie the duties toward the community,<sup>168</sup> what beliefs may, may not, must or must not be expressed,<sup>169</sup> and what behavior must be engaged in, not for direct temporal human benefit, but rather out of the duty to pay respect to the source of ultimate values.<sup>170</sup> The government may not endorse any set of values such as these which transcend temporal human welfare. This includes, of course, endorsement of the position that there are none. While this pro-

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<sup>166</sup> This requirement is related to both of the first two steps of the *Lemon* test—that government actions have a secular purpose and a primary secular effect. See *supra* notes 27-42 and accompanying text.

<sup>167</sup> See *supra* note 163. While precise definitions of the offenses differ, all states prohibit killing, theft and perjury and permit courts to redress defamation. Most, in one way or another, regulate extra-marital sexual conduct and create obligations toward family members. It has been noted that "[t]he particular religious basic motives which pervade . . . a certain historical period, also determine that period's legal views." H.J. VAN EIKEMA HOMMES, *MAJOR TRENDS IN THE HISTORY OF LEGAL PHILOSOPHY* 1 (1979).

<sup>168</sup> See *supra* notes 41-42.

<sup>169</sup> See *supra* notes 17-22 & 112-18 and accompanying text.

<sup>170</sup> Government may not even compel participation in ceremonies which might be construed to imply that government or other secular institutions are the highest source of authority. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).



hibits government expression of such positions, it should not necessarily prohibit assistance to citizens who wish to make their own personal statement endorsing such value systems, so long as such assistance can be, and is, available to all competing viewpoints. If the assistance is available to all viewpoints, such assistance does not endorse any of them, and does not violate liberal neutrality.

The difficult question will be where to draw the line between equal assistance and impermissible preferences. Some types of government support may not be possible on equal terms, or may be administered in such a way that surface equality becomes preferential treatment in practice. Thus, a properly applied system of liberal neutrality will not open the floodgates to excessive benefits to religion. Equal aid to all viewpoints will in many instances be impractical, and in such cases the only constitutional alternative will be to deny benefits across the board.

The essential core of liberal neutrality as applied to the religion clauses then, should be the principle that government may not endorse one set of religious beliefs over another, endorse religion over irreligion, or irreligion over religion. Since government must make value choices in legislating to promote the temporal welfare of its citizens, liberal neutrality is not violated by government practices aimed at promoting such welfare.<sup>171</sup> But government may not endorse specific belief systems beyond temporal human welfare, expression of those beliefs, or activity caused by those beliefs not related to temporal human welfare. The key factor in determining the existence of endorsement is whether preferential treatment is given or perceived as being given to a particular viewpoint. Thus, where government aid is available on genuinely equal terms to adherents of all competing views (including "irreligious" philosophies), the aid will not violate liberal neutrality.

This same framework should be used to approach both the establishment and free exercise clauses. Belief and expression should be protected in something approaching an absolute way; activity should be protected only where there is no serious adverse effect on government's legitimate concern with temporal human welfare. Any more protection would indicate impermissible endorsement of the religious view in question, any less would indicate impermissible endorsement of its antithesis.

How would those principles of liberal neutrality be applied in the context of common religion clause disputes? To what extent would outcomes differ from those obtained under the present, separationist-based system of first amendment standards?

## V. Liberal Neutrality and the Absence of Government Endorsement: Specific Applications

To substitute liberal neutrality for separation as the goal of religion clause analysis will lead to changes in some, but by no means all, current legal rules regarding church-state relations. Some changes would permit greater church-state involvement than current law tolerates, but other

<sup>171</sup> This is the case regardless of the fact that such welfare is consistent with the goals of any religion, or inconsistent with the views of others.

changes, interestingly enough, would be less permissive than prevailing rules.

### A. *Prayer in Public Schools*

Liberal neutrality would reaffirm most current rules regarding prayer in public schools. State-sponsored prayer, even in the absence of actual coercion to recite, clearly endorses the set of transcendent values embodied in the prayer.<sup>172</sup> In the diverse society of twentieth-century America, even a carefully drafted prayer seeking to endorse only a "least common denominator" set of values will inevitably offend some beliefs, perhaps by its very nature as the product of an attempt to be blandly inoffensive.<sup>173</sup> Certainly no setting could possibly provide a more authoritative state endorsement than the classroom, where students understand, in a variety of contexts, that they are expected to agree with the statements of the teacher.

At the same time, periods of silent reflection would remain permissible.<sup>174</sup> A period of silence endorses nothing except the concept that everyone should have something on which to reflect. To endorse the notion that people should have, and reflect on, values is not to endorse any particular set of them. To the extent that this benefits religion, it is perfectly neutral, since every religion (or irreligion) benefits equally. Silent reflection even recognizes a set of beliefs unique to one individual in a class, a situation highly unlikely to occur even under a system of spoken prayer where the prayers were rotated to give "equal time" to all of the traditional religions represented in the school.<sup>175</sup>

While liberal neutrality would prohibit state employees from conducting prayer, it is less certain that it would maintain rigid prohibitions against any privately sponsored religious instruction within the confines of the public school premises.<sup>176</sup> Programs which take time out of the public school day for voluntary religious instruction can clearly be seen as government endorsement of the substance of the instruction, if, as is likely, secular subjects are moved aside or not taught at all to make room for the religious instruction, or if the student's alternative to religious instruction is unattractive.<sup>177</sup> However, it is difficult to see how access to

<sup>172</sup> See *supra* notes 17-22 & 112-18 and accompanying text.

<sup>173</sup> [T]he notion of a 'common core' litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable. Father Gustave Weigel has recently expressed a widely shared view: "The moral code held by each separate religious community can reductively be unified, but the consistent particular believer wants no such reduction."

*Schempp*, 374 U.S. at 286-87 (Brennan, J., concurring).

<sup>174</sup> The Court invalidated the particular program of silence for "meditation or voluntary prayer" in *Jaffree*, due to the unique circumstances indicating that the inclusion of the phrase "or voluntary prayer" was solely motivated by a desire to promote religion. See *supra* notes 112-18 and accompanying text. Most of the Justices, however, suggested or stated explicitly, that periods of silence which were not presented as religious in nature would be acceptable. See *Jaffree*, 105 S. Ct. at 2493 (Powell, J., concurring).

<sup>175</sup> Some school districts, for example, attempted to achieve neutrality by alternating different versions of the Bible in mandatory bible reading exercises. See *Schempp*, 374 U.S. at 207.

<sup>176</sup> Current law is quite rigid on this point, at least for grade school students. See *supra* notes 8-11 and accompanying text.

<sup>177</sup> See *supra* notes 8-16 and accompanying text.

classrooms or other facilities after the regular school day, available to all on a content-neutral basis, would constitute endorsement of any belief system espoused by one who took advantage of that availability. While it is clear that under current law this reasoning applies to public colleges,<sup>178</sup> and may apply also to high schools,<sup>179</sup> there is no reason not to also extend this principle to public elementary schools.<sup>180</sup>

### B. *Government Aid to Religious Schools*

Application of current doctrine has led to the most elaborate system of distinctions in issues involving government aid to religious schools. While the Supreme Court has hesitated to follow separationism to its logical conclusion of adopting a flat prohibition against any such aid, the "Catch-22" nature of the *Lemon* test has stood to strike down most meaningful attempts at aid. If it is not closely supervised by government, the Court will find a danger that it will be used to promote nonsecular ends.<sup>181</sup> If it is closely supervised, then the Court will find the equally impermissible risk of excessive entanglement.<sup>182</sup>

Liberal neutrality would require serious reworking of present doctrine in this area. Clearly, religious education promotes both temporal human welfare and a particular transcendent value system. It is also clear that attempts to divide the instruction provided in such schools into clear "religious" and "secular" components are futile.<sup>183</sup> Although it is true that religious values permeate the secular concerns of the religious school, secular welfare, however, is the direct outcome and goal of much religious teaching. The ultimate question for liberal neutrality is not whether any government aid has been used to promote religion, but whether the aid program is or should be perceived as endorsing the transcendent values in addition to the secular concerns of the religion.

Clearly, aid to only one or any number of chosen religions to the exclusion of others would be impermissible. Choice implies endorsement. Would liberal neutrality go to the other extreme and hold that any aid program, even full government funding, provided to all religious

178 See *Widmar v. Vincent*, 454 U.S. 263 (1981).

179 In *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), the Court of Appeals distinguished *Widmar* and held that due to the relative immaturity of high school students, religious student groups could be excluded from an otherwise permissive policy of access to school facilities for student groups. The Supreme Court dismissed the appeal by a vote of 5-4, but did not reach the substantive issues involved, holding instead that the party bringing the appeal lacked standing to do so. 106 S. Ct. 1326. The dissenters not only disagreed on the issue of standing, but also expressed disagreement with the holding of the Court of Appeals, *id.* at 1336-39.

180 Judge Adams, dissenting from the circuit court holding in *Bender*, argued that fourteen and fifteen year-old students were sufficiently mature "to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity." 741 F.2d at 564 n.3 (Adams, J., dissenting). Implicit in Adams' position is the view that this permissive access policy should not apply to religious groups for students younger than high school age.

181 See *supra* note 36 and accompanying text.

182 See *supra* notes 27-35 and accompanying text.

183 This has long been cited as an argument for, if not disallowing all aid to religious schools, at least limiting aid to religious schools to the most peripheral, nonideological matters, such as the transportation at issue in *Everson*. Justice Douglas commented at length on the religious component indelibly linked to "secular" subjects such as biology, history and economics in his dissent in *Allen*, 392 U.S. at 257-65 (Douglas, J., dissenting).

schools on an equal basis, would not violate neutrality? Such a conclusion must be seriously questioned upon close examination.

In light of the importance of education, if the government is to support religious education, clearly it must at the very least provide a quality alternative for those who wish to pursue a completely secular education in order to preserve neutrality. If, therefore, a program of aid to religious schools is one which threatens the continued health and quality of secular public education, the effect of the program may be to make religious schools the sole option for those parents who want their children to receive a quality education. By permitting the nonreligious alternative to be driven out of the market, the state can no longer be seen as complying with the dictates of liberal neutrality.<sup>184</sup>

The danger of massive defections from the public schools will, of course, be greatest if parents incurred no additional costs (above tax payments incurred by all) in choosing the religious option over the public school. To guard against the possibility that a community might be deprived of a quality nonreligious educational option, full funding of religious education should not be permitted.

Liberal neutrality would not prohibit government support for temporal human welfare, even when the program promoting that end is run by religious organizations. Part of the agenda, both in terms of intent and effect, of religious education is to promote temporal human welfare. To the extent that state funding supports those secular goals, it is permissible. However, traditional establishment clause analysis makes partial funding impossible by insisting that a program of instruction be purely secular, since religious and secular goals are not blocked off into separate spheres in religious education, but exist together throughout the program.

A realistic view of the legitimate government interest in religious education would reject the notion that infusing the slightest religious content into a program taints it to the point of making it ineligible for government aid. Starting from the premise that much, but not all, of religious education is intended to, and does, promote temporal human welfare, liberal neutrality should conclude that some, but not all, of the expense of providing that education is permissible.

Admittedly, further line drawing is necessary, albeit difficult. What can be said with certainty is that the state may not fully fund religious education, as such funding would obviously finance both secular and religious ends. Also, the per pupil aid should also be less than the sum provided to the public schools for the same purpose, so that aid to religious schools does not make them actually favored by the state over their public counterparts.<sup>185</sup> Beyond this, it is difficult to draw bright-line tests.<sup>186</sup>

184 Support for the continued existence of one idea in the marketplace can be interpreted as an endorsement, not necessarily of that idea, but of the concept of pluralism. See generally DWORKIN, *supra* note 147. Generally, this principle can be used to permit, but not necessarily require, government support for a particular point of view. In light of the establishment clause, however, it would not be difficult to argue that first amendment concerns require the maintenance of an alternative to religious education for those who desire such education for their children.

185 Even those who favor public aid to religious schools generally acknowledge that there must be

We can state the ultimate question, however: The program of aid to religious schools must be limited so it is clear that to the extent it is seen as endorsing the schools' programs, it is seen as endorsing only the secular benefits which the program provides to the community. As long as the funding provided to public school alternatives is clearly more generous than aid to private schools, it is difficult to see limited aid to religious schools as endorsing their particular religious message.

Interestingly enough, under this analysis, limited direct aid to religious schools may pose less of a constitutional problem than proposed voucher systems which may be permissible under current, separationist-based doctrine. Because voucher systems provide permissible aid to parents and not impermissible aid to religious institutions, they may be permissible even where they generously benefit those institutions. It is possible, therefore, to justify a voucher system providing full tuition to any student, to be used at any institution. Since the aid goes directly to parents, and government does not decide how the voucher is to be used, the program is neutral on its face. But it is possible that in many communities, this free market might eliminate nonreligious educational alternatives. Such an outcome seems far closer to classic religious establishment in the community than a program where private schools were to receive, per pupil, fifty percent of what the state spends per pupil in public schools. It is ironic that the logic of separation may result in a program which is a more serious threat to the public schools than the limited direct aid permitted by a program of liberal neutrality.

### C. *Tax Exemptions*

Liberal neutrality would require no change in current doctrine regarding the permissibility of tax exemptions for property used for religious purposes.<sup>187</sup> As long as favorable tax treatment is available to all analogous nonprofit institutions, no endorsement of any particular message conveyed by the value systems supporting any one of them exists. Of course, to treat religion more favorably than institutions engaged in similar activities but who pursue values commonly thought of as irreligious would cross the line to impermissible endorsement. If one religion is eligible for favorable tax treatment, then all must be.

### D. *Symbols and Ceremonies*

Thus far, liberal neutrality has generally led to the conclusion that the establishment clause should be applied less stringently, or at least no more stringently, than it currently is. Liberal neutrality may, however, require a somewhat more stringent application of the establishment clause than does current law when the issue is government sponsorship

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some limits. Professor Choper, for example, suggests that aid be permitted "to the extent that it does not exceed the value of [the schools'] secular services." Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 340 (1968).

186 This would seem to follow from *Mueller v. Allen*, 462 U.S. 388 (1983); see *supra* notes 103-08 and accompanying text.

187 See *supra* notes 31-34 and accompanying text.

of religious symbols or ceremonies. Despite the incantation of the *Lemon* test in several of these cases, the Supreme Court has been quite tolerant of these practices when the direct, measurable effect on religious beliefs is perceived to be trivial. Thus, paid legislative chaplains,<sup>188</sup> Christmas creches,<sup>189</sup> invocations at public school commencement exercises,<sup>190</sup> and other symbols and ceremonies are permitted without serious attempts to apply the *Lemon* criteria.

While it may be true that the measurable effect of any single instance of this type in changing the religious views of anyone is negligible, the power of symbols and ceremonies to evidence endorsement of certain views, and to influence those views in the long run, is obvious. For this reason, Justice O'Connor's application of her own test in *Lynch* is troubling. She concludes that the city's display of a creche as part of a larger celebration of a public holiday is analogous to legislative prayers or placing the legend "In God We Trust" on coins. Government is not endorsing religion, merely "encouraging the recognition of what is worthy of appreciation."<sup>191</sup>

To understand the distinction between deciding what is "worthy of appreciation" and endorsement is difficult. Justice O'Connor may feel the need to graft a *de minimis* exception to her establishment clause approach. However, it must be recognized that to ignore the power of symbols is to seriously undercut the essential thrust of liberal neutrality; government must not endorse any set of values transcending temporal human welfare.

Government, then, should not be permitted to display religious symbols. To maintain a *de minimis* exception to this rule would be unwise. Repeated instances of endorsement are likely to have a significant effect, even where each instance, standing alone, is trivial. However, this does not mean that public places or occasions may not be used for religious ceremonies or displays. When symbols and ceremonies created by private individuals or organizations are granted access to public facilities on terms equal to those available for those desiring access for analogous nonreligious purposes, government has endorsed no value beyond the pluralism required by liberal neutrality.

Distinctions should be made, then, not on the basis of whether there is a "primary effect" of aiding religion, but rather whether the display or ceremony will be reasonably perceived as a choice of values by government, an endorsement of the message of the symbol or ceremony. Thus, giving a privately sponsored creche, identified as such, access to a public park on terms available to those wishing to erect nonreligious displays

188 See *Marsh v. Chambers*, 463 U.S. 783 (1983). See also *supra* notes 100-02 and accompanying text.

189 See *Lynch v. Donnelly*, 104 S. Ct. 1335 (1984). See also *supra* notes 109-11 and accompanying text.

190 See, e.g., *Grossberg v. Duesebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972). But there have been recent cases in which the courts have strictly applied *Lemon* and disallowed such invocations. See, e.g., *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (D. Iowa 1985).

191 *Lynch*, 104 S. Ct. at 1369 (O'Connor, J., concurring). The use of the inscription "In God We Trust" on coins was upheld in *Aranow v. United States*, 432 F.2d 242 (9th Cir. 1970).

threatens liberal neutrality far less than a city-sponsored display of the same type.<sup>192</sup> The military's support of chaplains from a wide range of faiths to provide religious counsel to servicemen, just as it supports psychiatrists and others to provide secular counselling, is less disturbing than a legislature's choice of a permanent, paid chaplain.<sup>193</sup> The ultimate question, once again, is not whether a proper degree of "separation" has been maintained, but whether government is perceived as having made a choice of transcendent values, and acted to express that endorsement.

### E. *Free Exercise Issues*

The relationship between the establishment clause and the free exercise clause may be the most difficult obstacle to the development of satisfactory religion clause analysis. The conflict in applying the two clauses results from the enormous difficulty of framing an analysis that effectively deals with a problem arising under one clause while not creating serious problems with respect to a problem arising under the other. The ultimate test of a system of religion clause analysis may be its compatibility with both of the two clauses. Having examined the application of liberal neutrality in establishment clause contexts, it is necessary to examine its implications for free exercise claims.

Current free exercise doctrine provides that when government interferes with a substantial part of an individual's religious practice, such interference must be justified by a "compelling" government interest.<sup>194</sup> To the extent that this rule is taken seriously, it may provide enormous advantage to religious adherents.

Clearly, exemption from otherwise generally applicable legal obligations can be of great value to a religion. While some of the exemptions litigated in the past, such as exceptions to dress codes<sup>195</sup> and objections to being photographed,<sup>196</sup> may seem trivial to the nonbeliever, others, such as the right to avoid compulsory schooling<sup>197</sup> or the right to an exemption from selective service,<sup>198</sup> benefit the believer in a manner that many nonbelievers would covet. Can government provide such a benefit without endorsing the belief requiring it? Is it impermissible to sacrifice, to any degree, the temporal human welfare sought by the statute to accommodate some transcendent value system?

To recognize a free exercise claim beyond the protection of the belief itself (protected absolutely) or its expression (protected by the

192 See *Board of Trustees of the Village of Scarsdale v. McCreary*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court*, 105 S. Ct. 1859 (1985).

193 Indeed, it could be argued that the failure to provide military chaplains would violate the free exercise rights of religious servicemen. See *Abington*, 374 U.S. at 309 (Stewart, J., dissenting).

194 See *supra* notes 43-74 and accompanying text.

195 See, e.g., *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (permitting the military to forbid the wearing of any visible religious symbols by its members with their uniforms).

196 See *Jensen v. Quaring*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court*, 105 S. Ct. 79 (1985).

197 See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See also *supra* notes 64-69 and accompanying text.

198 See *United States v. Seeger*, 380 U.S. 163 (1964); *Welsh v. United States*, 398 U.S. 333 (1970).

speech clauses of the first amendment) is to benefit the claimant. Under principles of liberal neutrality, the exemption would violate the establishment clause unless it was either justified by a benefit to the temporal welfare of the community or was available to anyone regardless of their system of ultimate values. If, when analyzed this way, the benefit would survive establishment clause analysis, then the free exercise clause compels the exemption when sought from a statute not providing for the exemption in the first place.

Rarely will it be obvious that a religion-based exemption to an otherwise generally applicable statute will benefit the temporal welfare of the community. However, some such instances will exist. It can be argued, for example, that to insist that a pacifist not be excused from combat is actually to interfere with the efficient functioning of the military. In this and other cases, a free exercise exemption can be justified for the purely secular benefits the exemption itself produces. Such an exemption does not violate liberal neutrality.

In fact, in all cases where a religion-based exemption cannot be shown to substantially harm the community the exemption should be granted. While there may be no obvious benefit to the temporal welfare of the community from each particular exemption, allowing religious exemptions from general duties where such exemptions cause no harm will minimize conflict between church and state. Of course, in allowing such an exception and in assessing whether it would substantially burden the community, courts should keep in mind that liberal neutrality insists that once an exemption is granted to the adherents of one religion, analogous exemptions must be available to adherents of all religions. Liberal neutrality would also provide that the concept of religion be broadly defined, as discussed above, to include all systems of belief regarding transcendent values. If exemptions cannot be extended this far without causing harm to the community, they cannot be allowed, for limiting their availability to adherents of particular, recognized religions would violate neutrality.<sup>199</sup>

Liberal neutrality, therefore, supports free exercise claims of exemption from generally applicable duties when the claimant demonstrates that, without exemption, he would be in substantial conflict with his (broadly defined) religious beliefs, and that granting the exemption will either benefit the temporal welfare of the community, or at least not substantially harm it. This appears to be a more difficult standard for the free exercise claimant to meet than the current test. Government may deny the exemption where the risk to general welfare is substantial rather than "compelling."<sup>200</sup> The distinction, however, may be more semantic than actual, and perhaps most of those who were successful under the current free exercise test would be successful under liberal neutrality.

For example, the Court's analysis in *Yoder*, establishing that the Amish home education alternative to the last two years of required

199 This would seem to follow from the reasoning used in *Seeger*, *supra* note 152.

200 The test as enunciated, if not actually applied, in current case law. See *supra* notes 43-74 and accompanying text.



schooling effectively achieved the secular goals of mandatory education, could be perceived as supporting the conclusion that exemptions for Amish children would cause no substantial harm to the community, as well as the conclusion that government lacked a compelling interest in uniform application of the statute.<sup>201</sup> Allowing such an exemption to any group which can provide equally effective alternatives to traditional schooling for high school children would cause no more harm than would the exemption for the Amish. Thus, the benefit may be granted to analogous claimants, and such an exemption under the free exercise clause is fully consistent with the standards of liberal neutrality.

As with the establishment clause, liberal neutrality will require some changes in current free exercise doctrine, but will not lead to a radical departure from prior Supreme Court holdings. Thus, liberal neutrality, the principle that government may not endorse any set of transcendent values over another, seems to provide a workable framework for analyzing and deciding cases arising under both of the religion clauses of the first amendment.

## VI. Conclusion

Current religion clause analysis fails to provide a satisfactory basis for avoiding or resolving disputes. This is largely due to the fact that the tests were framed to promote the goal of "separation" of church and state. To discuss the wisdom of separation is to miss the point of the first amendment. In the late twentieth century, with both government and religion expanding their areas of activity, and with the definitions of the proper scope of each growing, to separate church and state in any real sense is simply impossible.

If separation as a goal leads to nothing more than a vague sense that all government involvement with religion should be regarded with suspicion, then calls for a new goal of accommodation between church and state have often been just as vague. The only difference appears to be that the accommodationist bias would be in the other direction, toward upholding government involvement with religion in any close case.

An alternative approach to the religion clauses exists. The goal of liberal neutrality is consistent with the overall posture of the first amendment. The legitimate role of government is to promote the temporal welfare of the community. To the extent that government pursues this end, the fact that its acts are consistent with any religious doctrine is of no concern. What government may not do is go beyond promotion of temporal welfare, to endorse one or another concept of ultimate values transcending human welfare (including the position that there is nothing transcending such concerns).

The core of this doctrine, that the central message of the religion clauses is that government may not endorse or disapprove any set of religious values, has been most clearly articulated by Justice O'Connor. It is not yet clear, however, that even she will apply this test consistently and

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201 See *supra* notes 64-69 and accompanying text.

correctly. In particular, her comments indicate a great degree of tolerance toward government sponsorship of religious symbols, which in turn indicates that her concept of what constitutes an endorsement may be overly permissive.

Justice O'Connor's timidity in applying her own test may point to the most serious obstacle to adoption of liberal neutrality as the standard for religion clause analysis. The results of the test will not consistently please most of those strongly involved in the current church-state controversy. Liberal neutrality permits government aid to religion as long as all religious viewpoints (broadly defined) are supported on equal terms. Such a position is likely to outrage separationists. But liberal neutrality takes a strong position against government endorsement of religion through sponsorship of prayer or symbols. Such a position will clearly not satisfy many accommodationists. Perhaps more offensive to some accommodationists, liberal neutrality recognizes that "humanism"<sup>202</sup>—concern for human welfare without taking a position on whether that welfare is itself an ultimate goal or merely derivative of transcendent concerns—is the constitutionally mandated posture of American government. Regardless of the size of its constituency, however, liberal neutrality is the proper approach to issues arising under the religion clauses of the first amendment.

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202 "The intellectual and cultural movement that stemmed from the study of classical Greek and Latin literature and culture during the Middle Ages and was one of the factors giving rise to the Renaissance; it was characterized by an emphasis on human interests rather than on the natural world or religion." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 884 (1979). Neither theism nor atheism is a necessary part of the humanistic viewpoint.