

ARTICLES

STATE ACTION UNDER THE RELIGION CLAUSES: NEUTRAL IN RESULT OR NEUTRAL IN TREATMENT?

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I. INTRODUCTION

The United States Supreme Court's treatment of the first amendment's religion clauses¹ over the last fifty years has generated considerable controversy. While few religion clause cases reached the Supreme Court prior to 1940,² the number steadily multiplied once the first amendment was incorporated into the fourteenth amendment.³ The Court's doctrinal development was

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I, cl. 1.

2. Indeed, until 1960 only eight cases involving the establishment clause reached the Supreme Court, of which only five really raised an establishment issue. Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 142 (1963).

3. The incorporation of the first amendment into the fourteenth made the first amendment applicable to state action. Concerning the question of whether the fourteenth amendment extended those same limitations to the states, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949). See historical references cited in note 28 *infra* and the limitations on interpreting

incremental and uncertain, but by 1971 the Court had developed a test for each of the religion clauses⁴ to evaluate the constitutionality of challenged state action. Although these tests have not been followed with perfect fidelity,⁵ they have been the starting point for virtually all of the religion clause cases decided by trial and appellate courts in the last fifteen years. Only recently has a majority of the Court shown willingness to depart from the basic philosophy contained in these two tests.

The controversy surrounding the religion clauses has been characterized as a conflict between the ideals of equality in treatment and equality in result.⁶ Hence, when state action will have an effect upon religious activity, either by aiding it⁷ or hindering it⁸ the question is whether the state should seek to neutralize its impact⁹ or simply treat all parties alike?¹⁰

This article uses the term "affirmative action"¹¹ to describe the position favoring equality of result, and "nondiscrimination" to de-

legislative history, note 31 *infra*. Although this article does not purport to address the merits of the historical controversy, it is worth observing that those who claim to promote a "wall of separation" have frequently championed an "affirmative action" approach, which (because it requires such frequent involvement in theological controversy) breaches the "wall of separation" more frequently than the nondiscrimination principle proposed here.

4. Where a state action is challenged as violating the establishment clause, the Court has employed what has come to be known as the *Lemon* test, which declares state action unconstitutional unless it: (1) has a secular purpose, (2) has an effect that neither advances nor inhibits religion, and (3) avoids excessive entanglement between government and religion. See *infra* text accompanying notes 169-76.

Where a state action is challenged as a prohibition of the free exercise of religion, the Court has employed a test based on the *Sherbert* case, which asks whether state action creates a burden upon the free exercise of religion, and if so, is it justified by a compelling state interest? See *infra* text accompanying notes 302-11.

5. For example, the *Lemon* test was not used in *Marsh v. Chambers*, 463 U.S. 783 (1983). For a discussion of the *Marsh* decision, see *infra* text accompanying notes 520-29.

6. Note, *Developments in the Law Religion and the State*, 100 HARV. L. REV. 1606, 1719 (1987) (tension exists between Professor Kurland's model of "formal equality" and Justice Brennan's vision of "substantive equality").

7. For example, by providing textbooks to religious schools.

8. For example, by requiring applicants for unemployment to work on Saturdays.

9. The state can try to neutralize the impact of state action by forbidding the aid to religious schools and granting an unemployment law exemption to Sabbatarians.

10. Regarding equal treatment, the state could give aid to all schools, and require all applicants to work on Saturdays.

11. The same terminology is used in Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 209. Although the analogy is not perfect, it is useful to compare the differing attitudes toward equal treatment of racial groups. While some contend that the proper approach is "affirmative action"—paying close attention to the effects of state action on racial groups—others insist upon a "color-blind" approach whereby the state generally may not consider race as an appropriate criterion for decisionmaking.

scribe the position favoring equality of treatment. Sections IV and V of this article trace the development of both of the Court's tests and suggest that, until quite recently (and continuing in important respects) the Court has adopted the affirmative action approach, mistakenly attempting to equalize the *effects* of state action on religious activity.¹² The "nondiscrimination" approach, first articulated by Professor Philip Kurland,¹³ would instead focus primarily upon whether the state action is discriminatory.¹⁴

One of the consequences of the "affirmative action" approach is that it tends to create conflict¹⁵ between the two clauses. As Justice Rehnquist has noted, the overlapping demands of the two clauses have become a "Scylla and Charybdis"¹⁶ through which government authorities navigate at their peril. This results in doctrinal incoherence and the appearance of arbitrariness.¹⁷

12. See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 156-68 (1977) (Court has employed an "impact test" for both the establishment and free exercise clauses).

13. It seems appropriate to credit Professor Kurland with whatever there is of value to this article, because he proposed its foundation nearly 30 years ago, in an article, Kurland, *Religion and the Law: Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). This article was published in 1962 as a book by the same title. The function of the present article is largely to demonstrate that the concerns raised by Kurland's original article, far from receding in the intervening years, have become even more acute. Moreover, this article attempts to demonstrate through specific application that the nondiscrimination principle would both produce acceptable results and promote the neutrality toward religion that the Court espouses. Of course it parts company with Professor Kurland in specific cases, particularly the "hard cases" considered in section VI. As with the traditional disclaimer in such matters, he should be held responsible for anything good, but nothing bad, within this article.

14. In the words of Professor Kurland, whether the state has utilized a "classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *supra* note 13, at 6.

15. "[T]his court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, . . . and that it may often not be possible to promote the former without offending the latter." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

16. "By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting). This metaphor was recently employed by five members of the Court in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 906 (1989) (Blackmun, J., concurring) ("Justice Scalia rightly points out . . . that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them"); *id.* at 914 (Scalia, J., dissenting) ("By saying that what is not required cannot be allowed, Justice Brennan would completely block off the already narrow 'channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids] . . .'" (bracketed material in original)).

17. As Justice Scalia recently wrote:

An extended argument could be made that courts should confine themselves to passing upon the *means* utilized by the state in seeking its goals, rather than upon the *ends* whose achievement is being sought. Professor Bickel made this argument eloquently in the course of a critique of the Warren Court:

More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities? The Warren Court took the greatest pride in cutting through legal technicalities, in piercing through procedure to substance. But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is.¹⁸

Translated into the context of the debate over equality in treatment versus equality in result, the Bickel position would counsel that courts are ill-equipped to judge whether a particular state action has a positive or negative effect upon religious liberty. Such a standard invites both inappropriate deference¹⁹ and inappropriate usurpation.²⁰ Instead, the Court should focus upon whether or not

Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

Edwards v. Aguillard, 482 U.S. 578, 636 (1981) (Scalia, J., dissenting) (citation omitted).

For commentators' complaints, see Note, *supra* note 6, at 1609, 1634; Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 368 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980) ("application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis"); Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984); Marshall, *"We Know it When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) ("In the forty years since *Everson*, the Court has reached results in establishment cases that are legendary in their inconsistencies.").

18. A. Bickel, *The Morality of Consent* 120-21 (1975).

19. For example, where the Court approves the end despite an illegitimate means toward achieving the end.

20. For instance, where the Court disagrees with the wisdom or value of the end being

the state action represents a nondiscriminatory means of achieving some appropriate goal. However, the debate over generalized constitutional philosophy is far beyond the scope of this article. Instead, this article focuses upon the fact that the process of employing the affirmative action standard does substantial damage to religious liberty by entangling the Court in sensitive theological issues. Moreover, it has required constant skirmishing over the precise "balance" to be struck in particular cases. For example, in *County of Allegheny v. American Civil Liberties Union*,²¹ the Court was markedly split over whether a crèche and/or a menorah constituted an establishment of religion if displayed in a public building.

Since the affirmative action approach requires close scrutiny of the *effects* of state action upon religion, it requires courts to make judgments about what theological consequences—either to particular individuals or to a religion as a whole—will follow from whatever state action is being challenged.²² This kind of theological inquiry has been routinely eschewed in a long series of cases involving church control and other issues. Justice Stevens has identified the "overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims."²³ As Dean Ely has noted, "[A]n impact test of any variety would force legislators and administrators to make judgments of just the sort the framers of the First Amendment sought to discourage by the inclusion of the religious provisions."²⁴ I call this concept the "no-entanglement" principle.

sought.

21. 109 S. Ct. 3086 (1989); *see infra* note 397.

22. *See* Paulsen, *supra* note 17, at 332-33.

The resulting "primary effect" test has focused on the comparative impact of a given policy on religion as opposed to "nonreligion," a basis of distinction that has more than its share of problems. . . . If defining religion is impractical, defining its opposite (its inverse? its complement?) borders on the absurd. And discerning a law's different impact on each of these nether-regions involves the court in a positively cosmological quagmire.

Id.

23. *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring). Justice Stevens later cited this language in *Goldman v. Weinberger*, 475 U.S. 503, 513 n.6 (1986) (Stevens, J., concurring), an opinion in which Justices White and Powell also joined. The same language was also relied upon in Justice Brennan's plurality opinion in *Texas Monthly, Inc., v. Bullock*, 109 S. Ct. 890, 902 (1989), in which Justices Marshall and Stevens also joined.

24. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J.

Section II of this Article will briefly review the general outlines of the affirmative action/nondiscrimination dispute, and provide an overview of the major Supreme Court opinions on the religion clauses. Section III reviews the sources of the "no-entanglement" principle. Then sections IV and V demonstrate the entanglement caused by the "affirmative action" approach in two areas: (1) the school aid cases, where "sectarianness" of a school must be measured to determine how much benefit is derived from state aid to education; and (2) the free exercise cases, where "theological damage" must be measured to determine whether state action has interfered with free exercise. Finally, section VI describes how the alternative approach of nondiscrimination would resolve the very cases that have troubled the Court to date.

II. THE DISPUTED DEFINITION OF NEUTRALITY

A. *The Ideal of Neutrality*

Most courts and commentators²⁵ agree that *neutrality* should characterize the state's treatment of religion. In *Epperson v. Arkansas*,²⁶ the United States Supreme Court stated that "[g]overnment in our democracy, state and national[,] must be neutral in matters of religious theory, doctrine, and practice."²⁷ What has divided the courts and commentators is the definition of that prized neutrality. The language and legislative history of the religion clauses themselves are far from conclusive. While some

1205, 1316 (1970).

25. See, e.g., Lieder, *Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court's Establishment Clause Jurisprudence*, 22 Wake Forest L. Rev. 813, 815 (1987) ("neutrality is impossible"); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 331 (1987) (substantive establishment doctrine cannot be deduced from the ideal of neutrality); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177 (1979) (prefers "religious balance" to "religious neutrality"); Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PRR. L. REV. 83, 89 (1986) (Court and commentators "have become victims of the Establishment Clause neutrality muddle because they do not fully understand the concept of neutrality"); Mansfield, *Book Review*, 52 CALIF. L. REV. 212, 214 (1964) (Kurland's "doctrine of governmental neutrality as among religions or between religion and unbelief, is not in any helpful sense a 'neutral' doctrine").

26. 393 U.S. 97 (1968).

27. *Id.* at 103-04; see *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); see also *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872) ("[T]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

scholars have suggested that the religion clauses were intended to protect rather than prevent state aid to religion,²⁸ the received wisdom has been that the religion clauses were designed to erect "a wall of separation between church and State."²⁹ Even assuming that the framers³⁰ intent could be more precisely defined, there is

28. Several historians have argued that the religion clauses were a compromise between the views of Jefferson and Madison and the views of those who favored state support of religion. The compromise consisted of deferral in matters of religion by the national government to the states, which would then be free to establish (or presumably also to prohibit) religion as they saw fit. See, e.g., W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9 (1964); M. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 10 (1978); Van Alstyne, *What Is "An Establishment of Religion"?* 65 N.C.L. REV. 909, 910 (1987) (intent of first amendment may have been simply to prevent federal government from usurping states' power to establish religion).

For a treatment of the Supreme Court's use (and alleged abuse) of original intent, see Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827 (1986). Dunsford, *Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome*, 1984 UTAH L. REV. 1, 20 ("[A]s a fountainhead for doctrine, *Everson* is a polluted source. The opinion is shabby history and unacceptable legal analysis."). See generally Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 793 (1986) (historical reconsideration "would permit government support of any or all belief-systems, whether religious or irreligious, so long as such support does not discriminate among belief-systems (and therefore does not constitute an establishment) and so long as it is non-coercive (and therefore does not restrict free exercise."); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 268 (1968); Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986). But see L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* xii (1986) (nonpreferentialists have "flunked history"). Justice Rehnquist departed from the Supreme Court's tradition of acquiescence to the received wisdom in *Wallace v. Jaffree*, 472 U.S. 38, 99 (Rehnquist, J., dissenting). Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

29. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Jefferson's letter to the Danbury Baptist Association)).

30. One of the principal problems lies in identifying who the framers were. The most common source of authority is the framers of the first amendment. See *infra* note 133. However, it is universally accepted that the framers of the first amendment intended to permit the states to establish religion or to prohibit free exercise. Thus, their intent is of limited value to anyone attempting to frame a rule that would limit states and federal government equally. As far as the intent of the framers of the *fourteenth* amendment, almost no scrutiny has been given to their understanding of what "privileges and immunities" with respect to religion were protected against abridgment by the states. See U.S. CONST. amend. XIV, § 1. One commentator has argued persuasively that when the Blaine Amendment was debated, less than 10 years following the passage of the fourteenth amendment, it was evident that the fourteenth amendment was *not* understood to prevent the establishment of religion by a state. See O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L.J. 137, 200 (1963). Indeed, if one of the "privileges" of citizenship prior to the adoption of the fourteenth amendment was to receive state aid for religion, how could that privilege be "incorporated" by the fourteenth amendment so as to exclude such aid?

Even Justice Brennan, whose concurrence in *Schempp* attempted to justify the incorporation doctrine, acknowledged the historical ambiguity. See *infra* note 133. He simply con-

an additional question of whether their understanding of the religion clauses is binding upon later generations.³¹ Thus, those who proffer theories of the religion clauses are well advised to spend less time scrutinizing the language of the clauses and their legislative history, and more time demonstrating that a proposed theory operates in a logical and consistent fashion to generate acceptable results.³²

B. *The Rise of "Affirmative Action"*

As noted above, the religion clauses commanded almost no attention from the United States Supreme Court before 1940. Since then, however, the Court has steadily moved toward what this article terms an "affirmative action" view of the religion clauses. This

cluded that "it is certainly too late in the day to suggest that [the fourteenth amendment's framers'] assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the States." *Schempp*, 374 U.S. at 257 (Brennan, J., concurring).

31. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 238 (1980) ("[O]ne can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago."). But see Porth & George, *Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause*, 90 W. VA. L. REV. 109 (1987). In addition to the generic interpretivist/noninterpretivist battle, the problem of changed circumstances is particularly acute in dealing with the religion clauses:

[A]ny thoroughgoing effort to interpret the religion clauses of the first amendment by resorting to the original understanding of the authors and ratifiers of the Constitution is apt to be regarded as a misguided, if not dangerous enterprise . . . [E]ven though such resort [to the thinking of Madison] would provide *an* answer, it is unlikely that this answer would be both a constitutionally appropriate and politically satisfactory resolution of present-day problems. For when we turn to Madison's theories concerning religious freedom and nonestablishment, we must inevitably find them encrusted with certain implicit assumptions which were products of prevailing social, political, and economic conditions. Doctrinal formulations designed to achieve certain ends may achieve indifferent or perverse results when the assumptions on which they rest change.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383 (1967); see also T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 221 (1986) (framers' generation "passed to subsequent generations the task of working out the consequences of the principle that the state had no competence in religious matters.").

32. The religion clauses have generated a great deal of academic commentary precisely because the Court has been unsuccessful in articulating workable tests for deciding such cases. One essential feature of any proposed theory is that it contain principles of sufficient simplicity and particularity to generate predictable results. The second essential feature is that those results are, on the whole, acceptable. Although there will inevitably be dissatisfaction with particular results in particular cases, the overall pattern of results must engender the feeling that the spheres of both religion and politics have been protected from undue influence by the other.

thesis is graphically demonstrated by Table 1, which summarizes the important religion clause cases in the last fifty years.³³ About half of the cases in Table 1 consist of a facially neutral state action that was attacked by a party claiming that the *effect* of the statute was to promote or inhibit religion. Sometimes state action was challenged because it conferred a benefit or imposed a burden based on a religious classification,³⁴ but more often the complaint was that the state action *should have done so* and did not. The remaining cases concerned such issues as church control,³⁵ and other general first amendment principles.³⁶

Although the Court ultimately found the state action constitutional in many cases, it usually did so only after evaluating the effect of the state action: it found either the advancement (or inhibition) of religion was not present, or that under the circumstances it was "acceptable."³⁷ This "ad hoc balancing process"³⁸ is trouble-

33. Table I is in the appendix, immediately following the text of this article. The justices are listed in order of their position on the Court, beginning with the chief justice's position. For justices who share common initials, the following table identifies them:

WB:	Chief Justice position:	Warren Burger (1969-1986)
WB:	Position Number 4:	William Brennan (1956-)
HB:	Position Number 2:	Hugo Black (1937-1971)
HB:	Position Number 3:	Harry Blackmun (1970-)
HB:	Position Number 9:	Harold Burton (1945-1958)

34. These cases fall generally into three categories: (1) challenges to prayer or religious instruction in a public environment; (2) challenges to a practice with religious origins but allegedly transformed into a secular phenomenon, and (3) challenges to differential treatment based on religious belief or lack thereof. These cases are discussed in Section VI, *infra*, which describes the treatment of "hard cases" under the nondiscrimination principle.

35. See *infra* cases cited in Section III.

36. In *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, a New Hampshire resident placed tape over the portion of his license plate that proclaimed "Live Free or Die," the state motto. He challenged his conviction as a violation of his first amendment rights. The Court sustained his challenge, but without reliance upon a free exercise rationale. In reaching its decision, the Court stated that Maynard simply had a "First Amendment right to avoid becoming the courier for [an ideological] message." *Id.* at 717. Although one might question the soundness of the Court's holding in *Maynard*, it was appropriate to consider it a case involving general freedom of speech questions rather than specifically religious liberty issues. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

37. For example, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), a blind student at a religious school applied for financial benefits under a state vocational rehabilitation assistance program. Under the "affirmative action" approach, the Court has required that a statute must not have the *effect* of advancing religion. If a significant number of the beneficiaries of a program would use the benefits as part of a program designed to advance religion, the aid is barred. In *Witters*, the court found that "nothing in the record indicates that . . . any significant portion of the aid expended under the Wash-

some as a matter of judicial philosophy,³⁹ but the difficulty is magnified by the Court's conclusion that there is tension between the establishment and free exercise clauses.⁴⁰ Any state action that affects religion may be attacked either because it fails to help religion, or because it helps religion too much. While the cases do not reflect a consistent pattern, the votes of the individual justices are quite revealing. For example, of twenty-seven cases decided between 1971 and 1988, Justice Brennan found the challenged state action constitutional in only three of them.⁴¹ Justice (now Chief Justice) Rehnquist, on the other hand, found the state action unconstitutional in only one of those cases, and that was the denial of equal access by religious groups to a state university's facilities.⁴² The most fundamental difference in the attitudes of different members of the Court is thus not between so-called "strict separation" and "accommodation,"⁴³ but between those who tend to strike down otherwise neutral state action which produces an undesirable result, and those who permit state action to affect religion so long as its operation is nondiscriminatory. On balance, those who favor nondiscrimination have been in the minority. However, recent trends indicate that they may now constitute a majority of the Court.⁴⁴

ington program as a whole will end up flowing to religious education." *Id.* at 488. It therefore found that the effect of the statute was not to advance religion. *Id.* at 489.

38. See Choper, *supra* note 28, at 280.

39. If "the method of weighing constitutional objectives in order to choose among them affords no guidance for further action, except on what Holmes called a 'pots and pans' basis," then subjective assessment of the multitudinous elements at issue here is presumptively inappropriate for an independent judiciary as we know it.

Id. at 324, (footnote omitted) (quoting Kurland, *supra* note 13, at 96). See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

40. See *supra* note 15.

41. Justices Stevens and Marshall have a similar voting record.

42. *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* is a good example of the hazards of the "effects" approach. When a student group requested space in a state university's facilities to hold worship services, the university refused, claiming that to do so would constitute an impermissible aid to religion. *Id.* at 265. The Supreme Court correctly noted that since the university facilities were available on an "open forum" basis, the university had engaged in content-based discrimination by excluding religious speakers. *Id.* at 277. The university's mistake was understandable, however, since in the context of aid to parochial schools the Court has required analysis of the content of the schools' speech in proscribing otherwise neutral state aid to promote education. See *infra* text accompanying notes 117-210.

43. See, e.g., Cornelius, *Church and State The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?* 16 ST. MARY'S L.J. 1, 11-13 (1984); Mott, *The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond*, 14 J.L. & EDUC. 111 (1985); Comment, *Religious Activity in Public Schools: A Proposed Standard*, 24 ST. LOUIS U.L.J. 379, 392 (1980).

44. See *infra* text accompanying notes 120-24.

Since the "affirmative action" practiced by the Court requires constant supervision of state action to insure that it neither aids nor hinders religion unduly, it is not surprising that the court finds "tension" between the two religion clauses. The Court has "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other."⁴⁵ On more than one occasion, the Court has been forced to decide whether an action required by one clause would simultaneously violate the other clause. For example, in *Sherbert v. Verner*,⁴⁶ the Court held that South Carolina could not refuse to pay unemployment compensation to a Seventh-Day Adventist where her failure to accept a job requiring Saturday work was religiously motivated. In so holding, the Court found that there was no violation of the establishment clause.⁴⁷ Similarly, in *Committee for Public Education & Religious Liberty v. Nyquist*,⁴⁸ the Court held that aid to private, mostly religious schools, violated the establishment clause, even though the state had designed the aid in part to foster free exercise values.⁴⁹ Such cases dredged out the narrow channel between "Scylla and Charybdis" of which Justice Rehnquist complained.⁵⁰

The characterization of the case as an "establishment clause" case or a "free exercise" case can be decisive.⁵¹ In *Caldor, Inc. v. Thornton*,⁵² for example, employers challenged a Connecticut statute requiring them to accommodate employees' religious scruples against working on their Sabbath. The Supreme Court held the statute to be an impermissible advancement of religion. Although the Court had held in *Sherbert* that a state unemployment benefits system was constitutionally required to do the same,⁵³ *Sherbert* was not even mentioned in the Court's opinion. Despite the doctri-

45. *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970); see *infra* text accompanying notes 111-13.

46. 374 U.S. 398 (1963); see *infra* text accompanying notes 302-11.

47. *Sherbert*, 374 U.S. at 409; see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *infra* text accompanying note 328.

48. 413 U.S. 756 (1973).

49. *Id.* at 788.

50. *Thomas v. Review Board*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

51. See Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 15-17 (1979); Note, *supra* note 6, at 1633-34.

52. 472 U.S. 703 (1985).

53. See *infra* text accompanying notes 302-311.

nal frustrations created by its "ad hoc" approach, the Court has regarded its flexibility not as an embarrassment, but as a source of pride.⁵⁴

C. *The Alternative of Nondiscrimination*

Most of the criticism of the Court and the related debate on the religion clauses has resulted from differences of opinion as to how best to balance the apparently competing clauses. Several commentators suggest that the Court should recognize one clause (usually free exercise) as more important or fundamental than the other, and thereby reduce the apparent conflict.⁵⁵ But there is an alternative. Almost thirty years ago, in a widely noted—but uniformly rejected⁵⁶ article and book,⁵⁷ Professor Kurland suggested a procedurally neutral approach to the religion clauses:

The proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.⁵⁸

"[I]n short, the first amendment requires government to be 'religion-blind,' as the fourteenth requires it to be colorblind."⁵⁹ Today, of course, there is deep division over whether in fact the fourteenth amendment requires government to be colorblind. Proponents of affirmative action in matters of race suggest that only by making special allowance for past discrimination can gov-

54. "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions. . . ." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

55. See, e.g., Giannella, *supra* note 31, at 1389; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-7, at 833 (1978) ("[T]he free exercise principle should be dominant in any conflict with the anti-establishment principle").

This position is criticized by those who favor a unitary view of the religion clauses. Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980); see also Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1178 (1983) (first amendment favors both pro-minority religions and anti-majority religions).

56. This is Professor Kurland's own description of his article. Kurland, *supra* note 51, at 24.

57. See *supra* note 13.

58. Kurland, *supra* note 13, at 6.

59. Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389, 392 (1963).

ernment be truly neutral with respect to race.⁶⁰ The race analogy is a useful one, because it is clear that the Court has generally rejected the "religion-blind" approach in favor of one which looks toward religious motivation of the affected party, as a factor in distributing benefits and burdens.

It bears repeating that the purpose of this article is not to argue that the nondiscrimination alternative is more closely attuned to the intent of the framers⁶¹ of the religion clauses, or that it is better social policy. The contention here is that only the nondiscrimination approach will minimize the substantial damage done to religious liberty when government attempts to resolve essentially theological questions. This damage occurs whenever government is required to determine: (1) whether a belief is religious; (2) what effects state action will have upon the religion; and (3) whether the state interest is more or less important than the religious interests at stake. As the next section indicates, this type of determination has generally been found inappropriate for the government.

III. SOURCES OF THE "NO-ENTANGLEMENT"⁶² PRINCIPLE

Despite the tendency of the Court's tests to enmesh the judiciary in theological measurement, elsewhere the Court has firmly stated that the judiciary should avoid wading into theological controver-

60. See Farrell, *Integrating by Discriminating: Affirmative Action that Disadvantages Minorities* 62 U. DET. L. REV. 553 (1985); Morris, *New Light on Racial Affirmative Action*, U.C. DAVIS L. REV. 219 (1987).

61. See *supra* notes 28-31. However, there is no reason to think that the nondiscrimination alternative is any less in tune with the framers' intent than other proposals or current doctrine. Although some have criticized the Kurland thesis for having no historical foundation, in fact the nondiscrimination approach articulated here imitates the results that the framers likely would have reached. See *infra* note 377. Comparatively speaking the nondiscrimination approach requires less court intervention to "neutralize" the effects of state action religion and is relatively tolerant of state action. Similarly, the framers were completely tolerant of state action that either established or forbade religion. See *supra* note 23. Thus, although this article does not argue for the nondiscrimination principle on the basis of framers' intent, the reason for doing so is brevity rather than the outcome of such an analysis.

62. In this article, the principle of avoiding theological controversies is denominated the "no-entanglement" principle. While it is not exactly the same notion, a similar form of words was used by the Court in *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970), where one of the major goals of the religion clauses was described as the avoidance of "excessive government entanglement with religion." *Walz*, 397 U.S. at 674; see *infra* text accompanying notes 111-13; see also Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 382-89 (1984) ("Nonentanglement Requirement").

sies. First, in the "church⁶³ control" cases, the Court has consistently declared questions of orthodoxy and heresy off-limits, even where struggles for control of church property appear to require determination of whether one group or another is correct as to the founding tenets of the church. Second, where criminal liability hinged upon religious beliefs, the Court has not permitted juries to examine the truth or falsity of the religious beliefs themselves. Third, in distributing state benefits or burdens, such as tax exemptions, the Court has proscribed "excessive government entanglement with religion."⁶⁴ Finally, recent Court opinions have explicitly recognized the danger of using religious beliefs as a basis for government action.

A. *The Church Control Cases and "Neutral Principles"*

In the church control cases, the no-entanglement principle was developed incrementally. It began with the not uncommon case of dissension within a church body leading to a dispute over the right to control church property. In *Watson v. Jones*,⁶⁵ the Court distinguished three different forms of church organization: (1) those that derive authority from a particular *doctrine*; (2) those that derive authority from local *congregations*, (3) and those that are governed *hierarchically*.⁶⁶ The Court asserted the authority to decide questions of doctrine where doctrine itself was the source of authority, but it held that in cases involving hierarchically or congregationally organized bodies courts had a duty to defer to the structure used by the church to decide disputes.⁶⁷ Otherwise, the civil courts would inject themselves into essentially religious controversies,

63. "Church" is used throughout this article as a shorthand term for any religious institution.

64. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

65. 80 U.S. (13 Wall.) 679 (1871). The Court actually based its holding upon an interpretation of federal common law rather than federal constitutional law. The opinion predated both the incorporation of the first amendment into the fourteenth, and the abandonment of federal common law in diversity cases pursuant to *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938). In fact, two justices suggested that since the federal court lacked any superior jurisdiction to that of the state court, the proper rule was for the second court to abstain from interfering with the first court's action. *Watson*, 80 U.S. (13 Wall.) at 735-38 (Clifford & Davis, JJ., dissenting). Again, because no constitutional claim was asserted, the objection to jurisdiction seems well taken. However, the principles expressed, particularly because of their later adoption by the Supreme Court as a matter of *constitutional* law, see *infra* note 68, are important regardless of whether jurisdiction was properly exercised.

66. *Watson*, 80 U.S. (13 Wall.)

67. See *id.* at 723-27.

thereby violating the principle of freedom of religion.⁶⁸

In 1969, the Court made its withdrawal complete when it specifically rejected the authority initially claimed in *Watson v. Jones* to decide issues of doctrine. In *Presbyterian Church v. Hull Church*,⁶⁹ the Court was again confronted with a local congregation that had decided it was no longer bound by the authority of the general church body. Under Georgia law, an implied trust theory applied to church property: local churches held property for the benefit of the general church, but the general church retained control upon condition that it adhered to the "tenets of faith and practice existing at the time of affiliation by the local churches."⁷⁰ When there was a "departure from doctrine," the general church's interest in the trust property terminated. The local churches in this case had alleged precisely such a departure, and the Georgia courts agreed.⁷¹ The jury was asked to determine whether the actions of the general church "amount[ed] to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded."⁷²

A unanimous Court reversed the Georgia Supreme Court. Justice Brennan's opinion noted that, although there might be cases in which a court could appropriately involve itself in doctrinal dis-

68. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), just as in *Watson*, the Court was confronted with two sets of claimants to a piece of real estate. As in *Watson*, the Court found that the hierarchical organization of the ecclesiastical body in question required deference to the decisions of that body. The importance of *Kedroff* was that it decided the issue as a matter of constitutional law, not simply as a matter of federal common law. Moreover, it affirmed that the constitutional guarantee of religious liberty was superior to the purported authority of the state to regulate church organizations. Justice Frankfurter's concurring opinion commented on the necessity for vigilance: "The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority." *Id.* at 124-25 (Frankfurter, J., concurring).

69. 393 U.S. 440 (1969).

70. *Id.* at 443.

71. The Georgia Supreme Court listed the offending practices of the general church as including "ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church" *Id.* at 442 n.1 (quoting *Presbyterian Church v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 62-63, 159 S.E.2d 690, 692 (1968)).

72. *Id.* at 443-44.

putes,⁷³ there are important first amendment limitations. When forced to decide a question of the legal right to control property, courts must rely upon "neutral principles of law" to resolve such disputes, because "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."⁷⁴

The next step in the evolution of the no-entanglement principle, as applied to church control cases, came in *Serbian Eastern Orthodox Diocese v. Milivojevich*.⁷⁵ The Serbian Orthodox Church, which was conceded to be a hierarchically organized church, suspended and ultimately defrocked a bishop by the name of Dionisije. In the process it also revoked some of the organizational changes made by Dionisije.⁷⁶ Dionisije sued, claiming that the church had not followed proper church procedure in defrocking him.⁷⁷ The Illinois Supreme Court granted him relief. However, the United States Supreme Court reversed. In *Milivojevich*, the Court extended first amendment protection beyond substantive theological issues⁷⁸ but also to the procedural decisions made by the highest ecclesiastical tribunals of a hierarchical church.⁷⁹

73. For example, in *Gonzalez v. Archbishop*, 280 U.S. 1 (1929), the Court had affirmed the dismissal of a complaint by a Philippine citizen that he was entitled to be appointed chaplain by the Roman Catholic Archbishop of Manila. In that case Justice Brandeis had said that in ecclesiastical matters the decisions of the "proper church tribunals" are final, but prefaced that statement with the qualifying phrase, "[i]n the absence of fraud, collusion, or arbitrariness," *Id.* at 16. This sentence was quoted with approval by Justice Brennan. *Hull Church* 393 U.S. at 447. However, in the Court has since then essentially declined to review cases alleging fraud, collusion or arbitrariness. See *infra* note 77.

74. *Hull Church*, 393 U.S. at 449.

75. 426 U.S. 696 (1976).

76. *Id.* at 702-03.

77. *Id.* at 706-07. It might appear that these facts could bring him within the language of the *Gonzalez* case, *supra* note 73, if he could show fraud, collusion or arbitrariness. But Justice Brennan rejected the language in *Gonzalez* as "dictum only." *Milivojevich*, 426 U.S. at 712.

78. See *Hull Church*, 393 U.S. at 440.

79. *Milivojevich*, 426 U.S. at 709. Justice Rehnquist dissented in an opinion joined by Justice Stevens. He thought that the decisions in *Kedroff Kreshik* and *Hull Church* only required that the state abstain from matters of *doctrine*. Regarding procedural issues, Justice Rehnquist felt that no more deference was required to the ecclesiastical courts than would be required in a case involving a secular voluntary association. *Id.* at 734 (Rehnquist, J., dissenting). Indeed, he thought that in some cases precisely such issues would be inescapable:

Suppose the Holy Assembly in this case had a membership of 100; its rules provided that a bishop could be defrocked by a majority vote of any session at which a quorum was present, and also provided that a quorum was not to be less than 40. Would a

Thus, the church control cases have followed a relatively consistent pattern,⁸⁰ which has moved the Court further away from involvement with theological controversies. Not only is involvement in the substance of theological disputes forbidden to civil courts, but even jurisdiction over "procedural" disputes must be severely limited to prevent a civil court from usurping the right of a church to self-governance.

B. *The "Religious Belief" Cases*

Tending in the same direction away from involvement with theological controversies, though not so decisively, have been the cases raising the issue of individual belief. This issue arises most frequently where the free exercise of religion is asserted as a defense or basis for exemption from the enforcement of civil or criminal

decision of the Holy Assembly attended by 30 members, 16 of whom voted to defrock Bishop Dionisije, be binding on civil courts in a dispute such as this?

Id. at 727. Justice Rehnquist argued that if two parties presented themselves to the court, both claiming to be the ruling body of the Serbian Orthodox Church, the Court would be required to analyze church procedure to determine which was entitled to control of church property. Justice Rehnquist suggested that the Illinois Court was simply asking "if the real Bishop of the American-Canadian Diocese would please stand up." *Id.* at 726. Justice Rehnquist's hypothetical requires different treatment, however, since it portrays an *entire church* fragmented along doctrinal lines. In this case the party before the Court conceded that the hierarchically organized church was still legitimate, but merely questioned a particular decision. As a result, Dionisije stood in no different position from the disgruntled parishioners whose appeal was rejected in *Hull Church*. In such cases the court has a constitutional duty to defer to the decision.

80. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Supreme Court split sharply over the application of the "neutral principles" doctrine to a dispute over control of a church in Georgia. The majority of a local congregation voted to separate itself from the Presbyterian Church in the United States (PCUS), with which it had formerly been affiliated. The minority and PCUS sued to recover control, claiming that as a hierarchically organized church the determinations of PCUS were controlling. *Jones v. Wolf*, 443 U.S. at 598-99. The Georgia Supreme Court looked to the property deeds and other documents describing the relationship between the two entities, and ruled that the majority of the local church was entitled to control the property. *Id.* at 599. The United States Supreme Court affirmed, finding the reliance upon secular indicia of control more in keeping with the "neutral principles" approach. *Id.* at 604.

The dissenting justices thought the majority's approach too narrow, and a departure from the *Watson* direction to classify the church as "hierarchical" or "congregational." *Id.* at 610-11 (Powell, J., dissenting). There is some merit to the dissent's complaint, although as a practical matter the majority's holding requires only that religious bodies make their form of organization explicit when they record the deeds of ownership of local church property. But despite the disagreement over the *application* of the principle of "no-entanglement," the Court's decision in *Jones* emphasized the continuing commitment to avoid entry of the courts into the theological controversies surrounding struggles for church control. For a review of the case, see Adams & Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291 (1980).

law. To evaluate whether the free exercise of religion is implicated, the courts must consider at the outset whether a belief is "religious." They must also consider what effect the state action at issue would have upon religious practice. Such cases clearly present courts an opportunity to engage in theological reckoning. However, the Supreme Court has expressed great reluctance to do so.⁸¹

1. *United States v. Ballard*

In *United States v. Ballard*,⁸² Guy Ballard⁸³ claimed to have supernatural powers, such as the ability to cure diseases.⁸⁴ Based on these claimed powers, he formed the "I am" movement, and supported it by soliciting funds and memberships. After some disaffected members complained, he was charged with mail fraud. The indictment charged that Ballard had made representations of such ability which he knew to be false. At trial, the judge instructed the jury that they were not to consider whether the defendants' representations were true, only whether Ballard "honestly and in good faith believed them."⁸⁵ Ballard was convicted and appealed. The Ninth Circuit Court of Appeals reversed the conviction on the ground that it was error for the court to withhold the issue of the truth of the representations from the jury.⁸⁶ The government then appealed.

Ballard presented the Supreme Court with a nasty dilemma. The Court could agree with the court of appeals and permit the defendant to defend the truth of his theological assertions, thus allowing juries to sit in judgment of which religious beliefs are true or false. Or, it could require the defendant to defend his good faith

81. The Court's expressed reluctance to engage in such theological inquiry has not prevented it from adopting a standard in free exercise cases that makes the Court's involvement all but inevitable. See *infra* Section V. However, a recognition of this conflict has prompted several members of the Court to question the appropriateness of an affirmative action approach in free exercise cases. See *infra* text accompanying notes 123-24.

82. 322 U.S. 78 (1944).

83. Guy W. Ballard, apparently the chief object of the prosecution, died before trial. His wife Edna and son Donald were also named in the indictment, and the prosecution continued against them. For convenience the defendants will be referred to simply as "Ballard." See *id.* at 79-80.

84. For a discussion of Ballard's significance as a religious figure, see B. CAMPBELL, *ANCIENT WISDOM REVIVED* 161-62 (1980).

85. *Ballard*, 322 U.S. at 81.

86. *Id.* at 83. Chief Justice Stone pointed out that defense counsel did not object when the trial court withdrew from the jury the issue of the truth of Ballard's beliefs. *Id.* at 91 (Stone, C.J., dissenting).

in making the representations without regard to whether the representations were true or not. Except for Justice Jackson, all the justices thought the latter approach preferable.⁸⁷ However, Justice Douglas and four other justices remanded the case to the Ninth Circuit for reconsideration of other issues raised by Ballard on appeal. The Court held that the first amendment precluded the option of considering the truth of defendants' religious representations.⁸⁸

In sidestepping the question of whether Ballard's beliefs were true, the Court did not solve the problem. If the jury in such cases is instructed that the beliefs are to be presumed true, then there could be no fraud, since the representations would no longer be false. On the other hand, if the jury is told nothing about the beliefs they will follow their own hunches, which in the case of an unpopular religion like Ballard's will incline them to believe that the representations were in fact false and Ballard a charlatan. Only Justice Jackson recognized the unfairness of this result by pointing out that it is impossible to:

separate an issue as to what is believed from considerations as to what is believable. . . . How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.⁸⁹

Moreover, Justice Jackson doubted that representations concern-

87. Chief Justice Stone and two other members of the Court appeared prepared to simply reinstate the conviction, presumably because they were convinced that Ballard was a palpable fraud. *Id.* at 92 (Stone, C.J., dissenting); cf. W. BERNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 41 (1976). But there is other authority indicating that, whether a con artist or not, Ballard's followers understood him to be a genuine religious figure. B. CAMPBELL, *supra* note 84, at 161-62. The *perception* turns out to be a more important factor than the reality, because measuring it is less likely to result in entanglement. See *infra* text accompanying note 428.

88. *Id.* at 86; see *supra* text accompanying notes 65-68. The Court went on to state:

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

Ballard, 322 U.S. at 86-87 (citation omitted).

89. *Ballard*, 322 U.S. at 92-93 (Jackson, J., dissenting).

ing spiritual phenomena are believed in the same fashion as representations concerning secular matters.⁹⁰

2. *United States v. Seeger*

The next invitation to evaluate individual beliefs came in *United States v. Seeger*.⁹¹ Seeger was convicted of draft evasion after he applied for conscientious objector status and was refused. The Universal Military Service Act⁹² exempted from military service anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."⁹³ Section 456(j) defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."⁹⁴ Seeger claimed that he was conscientiously opposed to military service, but could not commit himself to a belief in a Supreme Being. However, "his 'skepticism or disbelief in

90. *Id.* at 93-94. On this point Justice Jackson stated:

Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

Id. at 94. Justice Jackson was clearly correct. In attempting to protect religious liberty the Court has stripped religious defendants and them alone of the opportunity to demonstrate that their beliefs are in fact true. Enforcement of the Court's approach invites discrimination against unpopular groups, whose beliefs are not widely shared. One doubts that a parish priest would be indicted for confessing that, despite his fund-raising campaign to build a new education building, he himself thought that the Resurrection was a fairy tale. A prosecutor would select for indictment only those, like Ballard, whose religious teachings would strike an average juror as incredible. Justice Jackson concluded: "I would dismiss the indictment and have done with this business of judicially examining other people's faiths." *Id.* at 95. "[T]he Court has never decided whether jurors can decide whether religious solicitors really believe their own claims. But Justice Jackson's view seems to have prevailed in practice." Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 420 (1986).

For a further discussion of the *Ballard* case, see Heins, "Other People's Faiths": *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981), Kurland, *supra* note 13 and Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964). For a resolution of the *Ballard* case under the nondiscrimination principle, see *infra* text accompanying notes 421-31.

91. 380 U.S. 163 (1965).

92. 50 U.S.C. app. §§ 451-73 (1958) (Current version at 50 U.S.C. app. §§ 451-73 (1982).

93. *Id.* § 456(j).

94. *Id.*

the existence of God' did 'not necessarily mean lack of faith in anything whatsoever;' he had a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."⁹⁵

The court of appeals reversed Seeger's conviction, finding that the requirement of belief in a Supreme Being violated the due process clause of the fifth amendment.⁹⁶ The Supreme Court affirmed but based its holding upon an interpretation of congressional intent rather than constitutional grounds. In construing the language, the Court found that Congress intended to make its category of "religious training and belief" inclusive rather than exclusive.⁹⁷ Despite an intent to exclude nonreligious views, Congress did not intend to "classify different religious beliefs, exempting some and excluding others."⁹⁸ The Court thought it particularly inappropriate for Congress or a court to attempt such a classification.⁹⁹ But while a governmental body is prohibited from determining the theological validity of a person's beliefs, this does not eliminate the need to examine whether those beliefs are sincere.¹⁰⁰

In reaching its decision, the Court relied upon a quote from the theologian, Dr. Tillich.¹⁰¹ One would hope that the Court was not

95. *Seeger*, 380 U.S. at 166 (quoting the record).

96. *Id.* at 167.

97. *Id.* at 176.

98. *Id.*

99. *Id.* at 184. "The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government." *Id.* (emphasis added).

100. *Id.* at 185. Even an examination of sincerity is troubling, because sincerity of belief is difficult to sever from the truth of the thing believed. See *supra* text accompanying notes 80-81. One commentator suggests that the problem can be solved by treating all free exercise claims as a subspecies of the protection for freedom of expression. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983). Professor Marshall does not indicate whether this principle would be applicable to a case like *Ballard*; nor does he indicate whether a state could make some exemptions available only to religious as opposed to secular claimants. See *infra* text accompanying notes 432-56.

101. In summary, Seeger professed "religious belief" and "religious faith." He did not disavow any belief "in a relation to a Supreme Being"; indeed he stated that "the cosmic order does, perhaps, suggest a creative intelligence." He decried the tremendous "spiritual" price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which [Seeger] held them, we think the Board, had it applied the test we propose today, would have granted him the exemption.

We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the

adopting Tillich's theological views by judicial notice.¹⁰² Instead, the Court's opinion should be read as demonstrating the Court's recognition that when legal rights are made dependent upon theological categories, a court cannot make a legal determination without at the same time becoming entangled in the most sensitive of theological issues.

3. *Welsh v. United States*

After adopting Tillich's broad definition of religion, the Court provoked yet more controversy in another draft exemption case, *Welsh v. United States*.¹⁰³ Conscientious objectors could be exempted from the draft only if their objection was based on "religious training and belief." But Welsh crossed out the words "religious training and" and rested his claim solely upon his "belief."¹⁰⁴ Conceding that the claimant would not describe his beliefs as religious, the Court thought that should not prevent the draft board from doing so.¹⁰⁵ The decision can be best understood as an expression of the Court's extreme reluctance to define or quantify religious belief.

Quakers. We are reminded once more of Dr. Tillich's thoughts:

And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God

Id. at 187. (quoting P. TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)).

102. One could easily accuse the Court (and Tillich) of circular logic. If every man's "ultimate concern" is by definition his religion, then every man is religious. The Court would then be holding that Congress intended to extend the exemption to *every* conscientious objector, of whatever stripe. This would have the effect of reading Congress' requirement of a religious basis for conscientious objection out of the statute.

103. 398 U.S. 333 (1970).

104. *Id.* at 335-37.

105. "[A] registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. *Id.* at 341.

Justice Harlan concurred, finding the Court's purported reliance upon statutory construction to be illegitimate, but the holding nonetheless compelled by the religion clauses: Congress was not required by the first amendment to make any exemptions, but "having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other." *Id.* at 356 (Harlan, J., concurring). The constitutionality of limiting exemptions to *religious* objectors is considered below. *See infra* text accompanying notes 432-56.

4. *Thomas v. Review Board*

In *Thomas v. Review Board*,¹⁰⁶ the Court reversed the denial of unemployment compensation to a Jehovah's Witness who quit his job for religious reasons. Thomas had been employed at a roll foundry that phased out its non-military production and assigned Thomas to work on tank turrets. After this assignment Thomas quit and applied for unemployment compensation. Thomas was denied unemployment compensation because his termination was not based upon "good cause."¹⁰⁷ The Court decided that the free exercise clause protected Thomas' right to compensation. Although only beliefs rooted in religion are protected by the Free Exercise Clause,¹⁰⁸ the Court would take a broad view of the definition of what is religious.¹⁰⁹ Finally, the Court declined to require that Thomas show that his belief was shared by other members of his sect, some of whom did not have scruples about working on tank turrets.¹¹⁰

C. *The "Excessive Entanglement" Prohibition*

A third source of authority for the proposition that the state should not take positions on theological issues is the line of cases in which the Supreme Court declared the state's obligation to avoid "excessive entanglement." The leading case in this area is *Walz v. Tax Commission*.¹¹¹ In *Walz*, the Court upheld the constitutionality of a tax exemption for property used solely for religious purposes. In doing so it described its task as a struggle "to find a neutral course between the two Religion Clauses."¹¹² In its view the religion clauses seek "to mark boundaries to avoid excessive entanglement" between church and state.¹¹³

106. 450 U.S. 707 (1981).

107. *Id.* at 712.

108. *Id.* at 713.

109. *Id.* at 714.

110. "Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences. . . . Courts are not arbiters of scriptural interpretation." *Id.* at 715-16.

111. 397 U.S. 664 (1970).

112. *Id.* at 668.

113. *Id.* at 670. While some had suggested that the social welfare function of many churches might be the touchstone of the exemption, the Court thought such an approach fraught with peril:

To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particu-

The avoidance of "excessive entanglement" was incorporated into the now familiar *Lemon* test, adopted in *Lemon v. Kurtzman*¹¹⁴ and its companion case, *Tilton v. Richardson*.¹¹⁵ These two cases will be considered in detail in section IV. For the moment it is sufficient to point out that the Court based its rejection of two different programs of state aid to parochial schools on the finding that Rhode Island and Pennsylvania could not administer the programs in question without "excessive and enduring entanglement between church and state."¹¹⁶ Similarly, the Court has been reluctant to identify "religious" speech as opposed to other forms of protected speech. In *Widmar v. Vincent*,¹¹⁷ the Court considered whether a student group's access to a state university's facilities could be limited simply because it was religious activity rather than some other kind of speech.¹¹⁸

[E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university and ultimately the courts to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.¹¹⁹

Recent statements of Justice Stevens in *Goldman v. Weinberger*¹²⁰ recognize the importance of these principles in free exercise cases. In *Goldman*, an Air Force captain (who was also a Jewish rabbi) sued to enjoin the enforcement of an Air Force regulation which prohibited the wearing of unauthorized headgear.

lar social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.

Id. at 674. Moreover, taxing churches might cause as much entanglement with churches as granting exemptions. "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675.

114. 403 U.S. 602 (1971); see *infra* text accompanying notes 169-76.

115. 403 U.S. 672 (1971); see *infra* text accompanying notes 191-97.

116. *Lemon*, 403 U.S. at 619 (Rhode Island). See also *id.* at 621-22 (Pennsylvania).

117. 454 U.S. 263 (1981).

118. Justice White attempted in his dissent to distinguish religious worship from other forms of speech protected by the first amendment. *Id.* at 282 (White, J., dissenting).

119. *Id.* at 269 n.6 (citations omitted).

120. 475 U.S. 503 (1986); see also *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer denied exemption from Social Security taxes, because of overriding governmental interest in the preservation of the soundness of the social security system).

Goldman complained that his religion required him to wear a yarmulke, and that forbidding him to do so would force him to violate his religious beliefs.¹²¹ Justice Stevens concurred in the Court's opinion upholding the Air Force regulation, but wrote a separate opinion noting that any alternative would involve the Court in evaluating the character and sincerity of the faith of persons requesting exemptions.¹²²

More recently, the Court considered a free exercise claim by California Indian Tribes whose worship sites were threatened by proposed development within a national forest.¹²³ Justice O'Connor, joined by four other justices, rejected the dissenting justices' suggestion that the Forest Service weigh the inconvenience to the government against the harm that would be inflicted upon the tribes' religious tradition, finding that "such an approach cannot be squared with the Constitution or with our precedents, and . . . would cast the judiciary in a role that we were never intended to play."¹²⁴

In short, the Court has routinely held that the religion clauses of the first amendment were intended to keep the state neutral with respect to theological matters. Even where a theological controversy flowers into a legal dispute, the state is required to deal with such disputes neutrally, so as to avoid even the appearance of favoring one set of theological views. However, the affirmative action approach frequently requires that this principle be honored in the breach rather than the observance, as the next two sections of this article demonstrate.

IV. ENTANGLEMENT WITH RELIGION BY PROHIBITING AID TO "SECTARIAN" INSTITUTIONS

The issue of "aid to parochial schools" was highly controversial even before the Court directly addressed it for the first time in 1947.¹²⁵ Although the Court ostensibly adopted its prohibition against aid to "sectarian"¹²⁶ private¹²⁷ schools and colleges¹²⁸ in or-

121. *Goldman*, 475 U.S. at 504-06.

122. "The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application." *Id.* at 513. (Stevens, J., concurring).

123. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

124. *Id.* at 458.

125. See *infra* note 286.

126. See, e.g., *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976) ("[N]o state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities can-

der to avoid "excessive entanglement"¹²⁹ with religion, the Court's standard has the opposite effect. No clear understanding of the problem is possible without a review of the path by which the Court arrived at its current approach.

A. *Everson and Allen: The Statement of the Problem*

1. *Everson v. Board of Education*

The court first addressed the issue of aid to parochial schools in the celebrated case of *Everson v. Board of Education*.¹³⁰ *Everson* dealt with a New Jersey taxpayer who challenged the constitutionality of a resolution by the local board of education appropriating funds to reimburse parents for the expense of transporting children to and from the Trenton and Pennington High Schools and the Catholic Schools.¹³¹ Justice Black, writing for a narrow majority, found that this form of aid did not breach the "wall between church and state."¹³² Justice Black first set forth the legislative history of the religion clauses as a basis for interpreting them.¹³³

not be separated from sectarian ones. . . .")

127. While the issue has usually been framed in terms of "aid to parochial [*i.e.* religious] schools," a significant question is whether the asserted unconstitutionality applies to the state's distribution of aid to *any* private schools, or just to those institutions that are "sectarian." Thus there are two different questions: (1) whether aid should be distributed to "sectarian" schools, assuming we could identify them; and (2) whether the state can identify which schools are "sectarian" and which are not.

128. For clarity, the term "schools" will be used to refer to elementary and secondary schools and "colleges" will be used to refer to colleges and universities.

129. See *infra* text accompanying notes 180-81.

130. 330 U.S. 1 (1947).

131. *Id.* at 62 n.59 (Rutledge, J., dissenting). Although this was the first case involving aid to private schools, the question of aid to religiously-affiliated organizations was far from new. In 1899, for example, the Supreme Court held that a hospital operated by a Catholic order of nuns was not disqualified from receiving subsidies from Congress. The Court held that the "fact that the hospital is conducted under the auspices of said church, [is] wholly immaterial." *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

132. *Everson*, 330 U.S. at 18.

133. According to this history, James Madison and Thomas Jefferson were the leading figures in the drafting of the religion clauses, which had "the same objective and were intended to provide the same protection against governmental intrusion on religious liberty" as the Virginia Bill for Religious Liberty. *Id.* at 13. The Virginia Bill had earlier been described as based upon "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Id.* at 11. In fact, even supporters of the "wall of separation" interpretation of the religion clauses have acknowledged that its limitations were intended to apply only to the federal government. See, *e.g.*, *Abington School Dist. v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) ("No one questions that the Framers of the First Amendment

He concluded that the establishment clause "was intended to erect 'a wall of separation between church and State.'"¹³⁴ The "wall of separation" metaphor has had many critics,¹³⁵ and Justice Black's reliance upon Jefferson's and Madison's personal views has been criticized as inappropriate.¹³⁶ However, no opinion challenged Justice Black's reading or the conclusion that he drew from it. Justice Black concluded that "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."¹³⁷

Nonetheless, Justice Black cautioned, "[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."¹³⁸ Exactly how to distinguish the one from the other was never spelled out. Based upon Justice Black's dissenting opinion more than twenty years later in *Board of Education v. Allen*,¹³⁹ it appears he had in mind some sort of distinction between general welfare programs and those designed to assist the educational function of the school.¹⁴⁰

It was the dissenting opinions that looked ahead to future cases

intended to restrict exclusively the powers of the Federal Government.").

134. *Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's Letter to the Danbury Baptists)).

135. Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND STATE* 25 (D. Oaks ed. 1963); see also *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech"); J. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949); Note, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645.

136. See *supra* note 28.

137. *Everson*, 330 U.S. at 16.

138. *Id.*; see also Costanzo, *Federal Aid to Education and Religious Liberty*, 36 U. DET. L.J. 1, 42 (1958) (federal aid policies implicate similar concerns).

139. 392 U.S. 236 (1968); see *infra* text accompanying notes 159-68.

140. Justice Black distinguished the provision of police and fire protection because they were "so separate and indisputably marked off from the religious function. . . ." *Everson*, 330 U.S. at 18. That is, although police and fire protection were even more essential to the school's operation than bus transportation, they were acceptable forms of aid because they were in his mind at least not related to the practice of religion. Of course, any attempt to disqualify religious organizations from the receipt of otherwise universally provided services would amount to precisely the form of discrimination he earlier suggested would be improper. *Id.* at 16. In later cases Justice Black subordinated this principle to the concept that some forms of "state law benefits"—educational assistance—were so closely tied to the religious function that they violated the principle of separation of church and state.

and attempted to state how the broad principles announced by the Court might be applied. Justice Jackson dissented because he felt the specific reference to "the Catholic schools" was "an essentially religious test."¹⁴¹ But the other dissenting opinion objected to the *inclusiveness* of the appropriation, rather than its exclusivity.¹⁴² Joined by Justices Frankfurter, Jackson, and Burton, Justice Rutledge relied on two major premises. The first was that the first amendment, as applied by the fourteenth, was intended to provide "complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."¹⁴³ The second premise was that the education provided at Catholic schools was in fact "religion."¹⁴⁴ Justice Rutledge could discern no constitutional middle ground between permitting all aid and permitting none,¹⁴⁵ because no rational line could be drawn between the reimbursement of transportation costs and the entire cost of parochial education.¹⁴⁶

One might easily quarrel with the first of Justice Rutledge's two major premises,¹⁴⁷ but the more interesting is the second. Justice Rutledge assumed that providing aid to a school run by the Catholic church was indistinguishable from providing aid to the church itself. His argument was quite simple and was based on past Court decisions¹⁴⁸ which had provided protection to all forms of religious practice, including street preaching and the distribution of tracts.¹⁴⁹ In *Pierce v. Society of Sisters*,¹⁵⁰ the Court recognized the

141. *Id.* at 25 (Jackson, J., dissenting).

142. It seems relatively clear that the majority considered the intent of the appropriation to be nondiscriminatory, and in any event would require it to be such. *Id.* at 4 n.2.

143. *Id.* at 31-32 (Rutledge, J., dissenting). The Court quoted this language with approval in *Abington School Dist. v. Schempp*, 374 U.S. 203, 217 (1963).

144. *Everson*, 330 U.S. at 32-33.

145. Justice Rutledge favored the latter approach. "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." *Id.* at 52-53 (Rutledge, J., dissenting).

146. *Id.* at 48. The Court eventually recognized the force of Justice Rutledge's argument. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 397 (1985) (court struck down a program for the "loan" of public school remedial reading teachers to private schools, noting that "there is no principled basis on which this Court can impose a limit on the percentage of the religious school day that can be subsidized by the public school.").

147. See *supra* notes 28 and 133.

148. The decisions cited by Justice Rutledge were: *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. Struthers*, 319 U.S. 141 (1943); and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

149. *Everson*, 330 U.S. at 32-33 (Rutledge, J., dissenting).

freedom to send children to parochial schools as a right protected by the first amendment. Since the word "religion" was used only once in the first amendment it should be interpreted symmetrically, and thus if a practice was constitutionally protected as an exercise of religion it could not be aided.¹⁵¹

There are two problems with this argument. The first lies in the use of the *Pierce* decision for the "symmetry" requirement, since *Pierce* was based broadly upon the authority of parents to determine the education of their children, not upon any special protection for *religious* education.¹⁵² The second problem lies in determining which institutions are "religious" either for purposes of the rights granted in *Pierce* or for the disqualification Justice Rutledge believed was required here. Because *Everson* involved Catholic schools, perhaps it appeared simple to distinguish the religious schools from secular ones. In his dissenting opinion in *Everson*, Justice Jackson attempted to articulate the sharp difference between the education in Catholic schools and the education in public schools.¹⁵³

150. 268 U.S. 510 (1925).

151. *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting).

152. The successful appellants in *Pierce* were parents who wanted to send their children to private school. While one was a religious school, the other was a military academy; they were not differentiated in the level of constitutional protection afforded by the Court. Thus, the reading of the case as a "religious liberties" case is unwarranted. See Kurland, *supra* note 13, at 14.

153. Justice Jackson's position is striking, perhaps because he was not entirely unsympathetic with the Catholic viewpoint.

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

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 a relatively recent development dating from about 1840. 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. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its

Even if one were to accept Justice Jackson's dichotomy, or Justice Rutledge's reasoning,¹⁵⁴ the problem of identifying which schools are "religious"¹⁵⁵ remains. It seems obvious that a private school which was not religious in any way¹⁵⁶ should have no difficulty qualifying for state aid. If the disqualifying feature of the sectarian school was that it did an inferior job in providing secular knowledge or skills, the Constitution might require that aid be conditioned upon proof that the state's purposes were being accomplished.¹⁵⁷ However, it seems clear that Justices Rutledge and Jackson objected not to the job that religious schools did in advancing the state's interest in education, but to the religious perspective and/or teaching of religious beliefs that comes *with* the secular education in a religious school. Even assuming that it is appropriate for the state to withhold aid from those who advance religious perspectives along with secular education, how does the state know when an institution is doing so? It may appear obvious in the case of a Catholic school, but what about a military academy like the one in *Pierce*? What if the military school were to employ a chaplain, or build a chapel, or require attendance at chapel? When would the school become "religious" for purposes of Justice Rutledge's ban? As we shall see below, no line can be drawn which

growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

Everson, 330 U.S. at 23-24 (Jackson, J., dissenting) (footnote omitted). It is of course true that the "aid" goes to the church itself. *But see* Choper, *supra* note 28, at 288-89 (state is not "aiding" the church school, but rather buying a secular service education). But even if the education subsidy is conceded to be aid, it still must be distributed in a nondiscriminatory fashion. If the state subsidizes some activity libraries, for example it cannot withhold that aid from some individual or group simply because the recipient will use it for religious purposes. A priest is entitled to a library card even if he uses it only to prepare his weekly homily.

Moreover, if Justice Jackson's dichotomy between the Catholic view and the Protestant view is accurate, has the Court in effect declared that the Constitution requires adoption of the Protestant view?

154. The Court eventually did so in large measure. As to Jackson's dichotomy, *see infra* text accompanying note 197; as to Rutledge's reasoning, *see supra* note 146.

155. What the Court was later to call "sectarian."

156. An example may be the military school which was one of successful appellants in *Pierce*. *See supra* note 152.

157. In fact, quite the contrary appears to be the case. Professor Laycock contends that there is a "compelling state interest" in permitting religious schools to educate disadvantaged children because they do a better job of it than the public schools. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1387-88 (1981).

will keep the state (or the courts) from measuring the amount of theological benefit received, and thereby engaging in precisely the kind of inquiry which it has otherwise eschewed.¹⁵⁸

2. *Board of Education v. Allen*

While Justice Rutledge expressed his opinions in dissent, nothing in the majority opinion rejected his views in principle, only their application, to the facts in *Everson*. In the next case to consider the problem, *Board of Education v. Allen*,¹⁵⁹ the underlying conflict surfaced. In *Allen*, the issue was the constitutionality of a New York statute requiring local school districts, upon request, to loan textbooks free of charge to "all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law."¹⁶⁰ The majority opinion agreed with Justice Rutledge that form of aid made a difference, but reached the opposite conclusion,¹⁶¹ sustaining the constitutionality of the statute. Writing for the majority, Justice White stated that although books, unlike bus fares, are "critical to the teaching process," and although "in a sectarian school that process is employed to teach religion . . . this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."¹⁶² Thus the majority rejected Justice Rutledge's assumption that support of education in religious schools was tantamount to support of the religion itself.

Justice Black, issued a furious dissent on this issue.¹⁶³ He understood *Everson* to have permitted only "a general and nondiscriminatory transportation service in no way related to substantive reli-

158. See *infra* text accompanying notes 211-57.

159. 392 U.S. 236 (1968).

160. *Id.* at 240 n.3.

161. Professor Katz, initially a supporter of the *Everson* opinion, had occasion to reconsider it, and concluded that the "no aid" position was untenable. "Like the dissenters in the bus fare case, I am not now able to distinguish between the minor payments there involved and payments for educational costs. I believe, therefore, that none of such nondiscriminatory uses of tax funds are forbidden by the First Amendment." Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 440 (1953).

162. *Allen*, 392 U.S. at 245.

163. Justices Douglas and Fortas also dissented, but did not join Justice Black's opinion. They believed that the mechanism for implementing the program would create confrontations between religious schools and school districts. *Id.* at 256 (Douglas, J., dissenting). This concern would be obviated by a restriction of loanable books to those approved for use in the public schools.

gious views and beliefs.”¹⁶⁴ He thought state-provided textbooks fell into a completely different classification:

I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The First Amendment’s prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court’s affirmance here bodes nothing but evil to religious peace in this country.¹⁶⁵

Justice Black was understandably upset at the failure of the Court to follow his dicta in *Everson*. But it is difficult to understand his attempt to make an absolute dichotomy between the two cases. The only new development in *Allen* was that aid went to the educational function of the school as opposed to its logistical operation. In neither case was the aid dependent on substantive religious views and beliefs.

Apparently it is the *similarity* between the subsidized activity and religious activity that Justice Black found critical. He was content to subsidize the parochial school in *Everson* by supplying all school children with bus fares and midday lunches,¹⁶⁶ because that was not similar to practicing religion, but he became apoplectic at supplying geometry textbooks.¹⁶⁷ While the school bus fare could

164. *Id.* at 253 (Black, J., dissenting).

165. *Id.* at 253-54.

166. *Id.* at 252.

167. This is apparently because geometry textbooks directly promote the educational mission of the school, whereas transportation and lunches might be motivated to preserve health and safety. Even commentators who have attempted to justify Justice Black’s approach have suggested that some support would be acceptable. For example, one article suggests that “[a] theory of strict neutrality would mean just this: that no aid should be allowed to flow from the state to religious organizations either indirectly or directly, except when embodied in a general welfare grant benefitting society as a whole.” Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1475 (1981). Would not a program designed to extend funds to parents for the education of their children qualify as a “general welfare grant benefitting society as a whole”?

certainly be justified on another basis, such as assuring children's safety, at what point is the state required to consider what the recipients of state aid will do with it? Justice Black wanted to prevent the aid designed to promote education from being diverted to the support of religion. But the same diversion occurs when the state promotes safety by subsidizing bus fares.¹⁶⁸ Moreover, the same problem of diversion occurs when the state hands out free library cards to those who use them to further their own religious goals, or welfare checks to those who use the money to go to church.

B. *The Adoption of the Prohibition: Lemon and Tilton*

Given the fact that the Supreme Court had never held aid to a private school in violation of the establishment clause, and the Court's broad basis for the holding in *Allen*, the ruling in *Lemon v. Kurtzman*¹⁶⁹ may have come as something of a shock. While the Court approved aid to religiously affiliated colleges in the companion case of *Tilton v. Richardson*,¹⁷⁰ it struck down similar aid to religiously affiliated schools in *Lemon*.¹⁷¹ The centerpiece of both cases was the now familiar three-pronged test. A statute challenged under the establishment clause will survive only if it: (1) has a "secular legislative purpose";¹⁷² (2) has a "principal or primary ef-

168. Justice Marshall attempted to make the distinction between bus fares and textbooks when he suggested in *Wolman v. Walter*, 433 U.S. 229 (1977), that *Allen* should be overruled. See *infra* note 186.

169. 403 U.S. 602 (1971).

170. 403 U.S. 672 (1971).

171. The form of aid was slightly different in the two cases that were consolidated into *Lemon*. In No. 569/70, Rhode Island, taxpayers challenged the Rhode Island Salary Supplement Act, which provided a 15% salary supplement to teachers in nonpublic schools at which the average per-pupil expenditure was below the public school average. To qualify, a teacher was required to teach courses offered in the public schools and could not teach religion. *Lemon*, 403 U.S. at 608. In the second case (No. 89), a taxpayer challenged Pennsylvania's Nonpublic Elementary and Secondary Education Act, which authorized "contracts" for the purchase of "secular educational services" from nonpublic schools. Reimbursement was limited to courses "presented in the curricula of the public schools," and precluded reimbursement "for any course that contains 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.'" *Id.* at 610.

172. *Id.* at 612. This "test" was an amalgam of tests used in earlier establishment clause cases; the first two elements were derived from *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968), which in turn had followed the approach used in *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). See *Lemon*, 403 U.S. at 612. The third element was derived from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970), discussed *supra* at text accompanying notes 111-13. See *Lemon*, 403 U.S. at 613.

fect that neither advances nor inhibits religion";¹⁷³ and (3) does not "foster 'excessive government entanglement with religion.'" ¹⁷⁴ The *Lemon* test has served as the starting point for application of the establishment clause ever since,¹⁷⁵ but its announcement was prefaced by a warning that bright lines or tidy distinctions could not be expected.¹⁷⁶

In applying the three-pronged test in *Lemon*, the Court found that the first prong was easily satisfied.¹⁷⁷ As to the second prong of the test, the Court was not prepared to declare itself. It hinted that it might find a violation of the second prong, noting that in its limitations, the state had implicitly acknowledged¹⁷⁸ "that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses."¹⁷⁹ Under the third prong

173. *Lemon* 403 U.S. at 612.

174. *Id.* at 613.

175. "[S]tate action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985).

176. 403 U.S. at 612 ("Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.")

177. "[T]he statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else." *Id.* at 613.

In fact, the Court has repeatedly taken for granted that in providing aid to religious schools, the states were not acting out of a hidden desire to aid religion, but rather wanted to advance secular aims. This was to become a familiar refrain in school-aid cases. See *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985) ("As has often been true in school aid cases, there is no dispute as to the first test."). Thus, the condemnation of school aid is entirely a creature of the "affirmative action" focus upon effects; if the Court abandoned the affirmative action approach to the religion clauses the problem of "aid to religious schools" would disappear entirely. *Meek v. Pittenger*, 421 U.S. 349, 363 (1975) ("We accept the legitimacy of this secular legislative purpose"); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) ("[W]e have no difficulty with the first prong of this three-part test"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) ("We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren").

178. See *supra* note 171.

179. *Lemon*, 403 U.S. at 613. This assumption was crucial, since the "entanglement" problems which the Court found to doom the programs could have been easily cured by reducing some of the restrictions. By assuming that these restrictions had been put in place because they were *constitutionally required*, the Court closed off the logical avenue for curing the constitutional infirmities it found. The Court eventually held in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), that even more limited aid failed the second prong of the *Lemon* test, because its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." *Id.* at 779-80.

The "effect" finding in *Lemon* was made easy by the fact that the schools themselves would admit that their primary purpose was the inculcation of religion. As we shall see, however, that is a different question from whether or not the principal or primary effect of the *state's aid of those schools* is to advance or inhibit religion. Nonetheless, because of the

the Court found that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."¹⁸⁰ The essential vice of the programs was that to enforce the "no teaching of religion" prohibition, the states would be required to police the religious schools.¹⁸¹

Although it claimed to apply an objective test that was based upon earlier holdings of the Court, the opinion made it clear that the Court saw the *Lemon* case as one which ultimately required the kind of value judgment extolled in *Walz*.¹⁸² After paying tribute to the social benefit derived from church-related schools, the opinion concluded:

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction

similarity between these two factors, it was easy to make the logical leap.

180. *Lemon* 403 U.S. at 614. The use of the entanglement prong as a separate test has been reviewed and criticized in Ripple, *The Entanglement Test of the Religion Clauses A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980).

181. An additional form of entanglement was the "divisive political potential of these state programs." *Lemon*, 403 U.S. at 622. In the process of determining the amount of the subsidy for private schools, "many people . . . will find their votes aligned with their faith." This is another forbidden form of entanglement, since "political division along religious lines was one of the principal evils which the First Amendment was intended to protect." *Id.* The Court did not clarify the operative significance of this form of entanglement whether by itself it could doom an otherwise acceptable program, or whether it was one of several "factors" to be weighed in making a determination. In *Nyquist*, 413 U.S. at 798, the Court cited this form of entanglement as a "warning signal" of unconstitutionality.

For a critique of the use of the "divisiveness" test to invalidate otherwise constitutional legislation, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 230 (1980) ("the inconsistent and incoherent use and nonuse of the political divisiveness test by the Supreme Court suggests that the utility of this test as a tool of constitutional adjudication is dubious"); Paulsen, *supra* note 17, at 346 (the establishment clause "does not grant government an affirmative power to expunge the potentially explosive presence of religious views from public and political life"); Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U.L. REV. 487, 513 (1980) ("If . . . persons of particular faiths have a right to take a stand on public issues, then religious motivation, and political divisiveness alone would seemingly not be sufficient to present Establishment Clause problems.") (footnotes omitted). But see Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 FORDHAM L. REV. 1209 (1984) (suggesting that the *Lemon* test be supplemented by a fourth prong that would invalidate legislation that results in division of the political body along religious lines).

182. See *supra* text accompanying note 54.

and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.¹⁸³

But *Lemon* declined to specify exactly what line *was* being drawn. While making it clear that open-ended aid to religiously-affiliated schools was now out of the question, the validity of *Everson's* sanction of bus fares or *Allen's* approval of textbook purchases was not questioned. Subsequent cases attempted to classify aid according to permissible and impermissible *types*. Tax benefits were initially disapproved,¹⁸⁴ then rehabilitated.¹⁸⁵ Statutes providing for instructional materials as well as textbooks, or field trips as well as bus fares, produced a hopelessly divided court which could not agree on whether filmstrip projectors or maps and globes were distinguishable from textbooks, and if so, on what principle.¹⁸⁶ Even-

183. *Lemon* 403 U.S. at 625.

184. In *Nyquist*, the Court struck down a provision of a New York statute which would have provided tax relief for parents who sent their children to private schools. The Court professed uncertainty as to whether it was dealing with a tax credit or tax deduction, but concluded that "the constitutionality of this hybrid benefit does not turn in any event on the label we accord it." 413 U.S. at 789. It was unconstitutional because "the money involved represents a charge made upon the state for the purpose of religious education." *Id.* at 791 (quoting 350 F. Supp. 655, 675 (Hays, J., dissenting)).

185. In *Mueller v. Allen*, 463 U.S. 388 (1983), the court found constitutional a deduction against Minnesota state income tax for the costs of tuition, transportation, and textbooks at elementary and secondary schools. Two aspects of the case are notable. First, the Court attempted to distinguish *Nyquist*, with limited success. 463 U.S. at 398-99. But second, it seems in retrospect astonishing that the vote (5-4) was so close. Strangely unmentioned in the majority opinion was this argument: if a contribution to a church's religious education program would be deductible without much question under *Walz*, upon what basis is it unconstitutional to deduct a payment for private school tuition? Could anyone take seriously an argument that "diversion" to religious education would make the program unconstitutional?

186. See *Wolman v. Walter*, 433 U.S. 229 (1977). Only two justices could agree on the proper disposition of six different forms of aid (secular textbooks; standardized tests; speech and hearing diagnostic services; therapeutic, guidance and remedial services; instructional materials and equipment "incapable of diversion to religious use"; and field trips). Justice Marshall suggested that order could only be achieved by overruling *Board of Educ. v. Allen*, 392 U.S. 236 (1968):

By overruling *Allen*, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance."

Wolman, 433 U.S. at 259 (Opinion of Marshall, J.). Justice Marshall described this as the

tually, the cases permitting aid (*Everson* and *Allen*) were more or less confined to their facts.

Aside from the fundamental incoherence of the purported distinctions between bus fares, field trips, textbooks, and filmstrips, there is an unexamined distinction between eligible and ineligible institutions. Surprisingly little attention¹⁸⁷ has been devoted to this more troubling issue. Assuming *arguendo* that this disqualification of "church-related elementary and secondary schools"¹⁸⁸ were constitutionally required, how are such schools to be identified? As noted above,¹⁸⁹ it seems indisputable that if the state awarded funds to a school having no church ties, no provision of the constitution would be offended.¹⁹⁰ Thus, there must be some kind of "sectarianism" meter that will tell a state agency or court when the establishment clause has been violated.

This problem is highlighted by *Tilton v. Richardson*,¹⁹¹ the companion case to *Lemon*. Whereas in *Lemon* there was a challenge to

line that Justice Black thought he was drawing. *Id.* n.4. But neither Justice Black nor Justice Marshall could explain why using the schools as a "convenient place" to reach the state's target population for the purpose of advancing education should be constitutionally different from using them to promote health or safety. See *supra* text accompanying notes 166-67. Moreover, it does not answer the question raised in this article of how the ineligible "sectarian" schools are to be identified.

187. The only significant commentary on this issue was contained in two articles in *The Supreme Court Review*. Professor Giannella thought that the Court intentionally used a "broad-brush" technique, since case-by-case analysis would "involve the judiciary in just the kind of entanglement that the Court presumably was trying to avoid." Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 181. Similarly, Professor Morgan suggested that the Court may have struck down the entire program in order to avoid "Equal Protection Clause embarrassment if the program remained in effect with lower courts making a school-by-school determination of eligibility based on the extent of religious infusion in each." Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 92 (footnote omitted).

188. *Lemon*, 403 U.S. at 625.

189. See *supra* text accompanying note 156.

190. Nonetheless, when permissible aid was mixed with impermissible aid, the Court invalidated both types. Shortly after *Lemon* was decided, the Pennsylvania legislature enacted another tuition reimbursement program, with a severability clause to save whatever in the program might be constitutional. When the constitutionality of the program was challenged, the district court ruled that none of the aid, including aid to parents of children registered in nonreligious, private schools, was constitutional. *Sloan v. Lemon*, 413 U.S. 825, 828 n.1 (1973). On appeal, the Supreme Court treated it as a companion case to *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (see *supra* note 184). The Court stated that "valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts. The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution." *Sloan*, 413 U.S. at 834.

191. 403 U.S. 672 (1971).

receipt by private schools of state financial aid, in *Tilton* the challenge was to the receipt by church-related colleges and universities of federal aid.¹⁹² The Court narrowly¹⁹³ sustained the constitutionality of the grants, with one minor exception.¹⁹⁴ The decisive point for the plurality was a finding¹⁹⁵ that the church-related colleges were not "sectarian," thus distinguishing them from the church-related schools in *Lemon*.¹⁹⁶ This was significant because it changed the focus to the primary purpose of the institutions, which in turn significantly reduced the risk of excessive entanglement. In *Tilton*, the Court provided valuable insight into what it meant by "sectarian."¹⁹⁷

192. The Higher Education Facilities Act of 1963, 20 U.S.C. § 751(a)(2)(C) (current version at 20 U.S.C. § 1132-1(1988)) provided for construction grants to colleges and universities, so long as the funds would not be used to construct any facility "to be used for sectarian instruction or as a place for religious worship. . . ."

193. Only Justices Blackmun, Harlan and Stewart joined Chief Justice Burger's plurality opinion. Justice White concurred in the judgment and wrote separately, since he had rejected the *Lemon* test which was the starting point for the analysis in *Tilton*. *Lemon*, 403 U.S. at 661, 665 & n.1 (White, J., concurring).

194. The statute provided that if the property should be used in violation of its terms (namely for religious purposes) within the first 20 years of operation, the recipient would be required to repay to the government the same portion of the building's present value as the federal grant bore to the original construction cost. The Court held that the ability to use the facility for any purpose presumably including religious ones after the 20 year period constituted the gift of a reversionary interest, and was thus void. *Tilton*, 403 U.S. at 682-84.

195. It is revealing that this "finding" was made by the Supreme Court itself rather than the trial court. This was one of Justice Brennan's complaints in dissent. He agreed that constitutionality hinged on whether or not an institution is "sectarian," but he thought that issue was for the trial court, which made no findings on that issue. *Lemon*, 403 U.S. at 659 (Brennan, J., dissenting).

The question of whether the determination of "sectarianness" should be made on such a case-by-case basis is a central ambiguity in the Court's announced standard. See *infra* text accompanying notes 250-57. Justice Brennan defined a sectarian university as "an educational institution in which the propagation and advancement of a particular religion are a primary function of the institution." *Lemon*, 403 U.S. at 659-60. While this standard appears to lean toward the "denominational" definition of "sectarian," by referring to "a particular religion" it also uses the indefinite article, so that the existence of other "primary purposes" of the institution would not guarantee eligibility.

196. *Tilton*, 403 U.S. at 685-87.

197. In *DiCenso [Lemon]* the District Court found that the parochial schools in Rhode Island were "an integral part of the religious mission of the Catholic Church." There, the record fully supported the conclusion that the inculcation of religious values was a substantial if not the dominant purpose of the institutions. . . .

Appellants' complaint here contains similar allegations. . . . [W]e are not required to accept the allegations as true under these circumstances, particularly where, as here, appellants themselves do not contend that these four institutions are "sectarian."

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college

By highlighting the presence of some characteristics¹⁹⁸ and the absence of others¹⁹⁹ the Court suggested that a "bright line" could be drawn between sectarian and non-sectarian institutions. But this dichotomy is illusory. There is a full spectrum of "fervor," and no line can be drawn without significant entanglement in the most sensitive religious issues.²⁰⁰ Moreover, because of the large financial impact of the determination, it is likely to have profound effects upon educational policy.

Subsequent cases have provided little clarification of what the Court had in mind, although the Court has routinely approved financial aid to colleges.²⁰¹ For example, in *Hunt v. McNair*,²⁰² taxpayers challenged the constitutionality of state tax benefits extended to the Baptist College at Charleston. In deciding that the

church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

The record here would not support a conclusion that any of these four institutions departed from this general pattern. . . . The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. . . . In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Id.

198. For example, academic freedom and emphasis on secular education.

199. For instance, proselytization and indoctrination.

200. Another significant problem in the test is that it makes a sharp distinction between aid to religious *institutions* and aid to individuals who then use their funds at religious institutions. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405.

[D]espite the similarities [to "direct aid" programs], indirect aid programs are sharply differentiated in practice and constitutional doctrine from direct grant programs The individual beneficiary may use the aid in any qualified institution, and there are no restrictions based on the religious or political affiliations of such institutions. For example, students may use veterans' benefits, Pell Grants, and other educational grants and loans at any accredited institution of higher learning, including religious schools and even seminaries."

Id. at 424-25.

201. In *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976), a Maryland statute provided subsidies to all private colleges and universities except those that awarded "only seminary or theological degrees." *Id.* at 740. Taxpayers challenged the receipt of funds by four colleges affiliated with the Roman Catholic Church. Although the colleges employed chaplains, held religious exercises on campus, and taught mandatory religion or theology classes, the district court found "clear and convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.'" *Id.* at 756-57. Based on this factual finding, a plurality of the Supreme Court affirmed. *Id.*

202. 413 U.S. 734 (1973).

aid was constitutional, the Court noted that:

[A]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.²⁰³

Recent cases have reaffirmed the disqualification of “pervasively sectarian” institutions. In *Grand Rapids School District v. Ball*,²⁰⁴ the Court struck down remedial programs conducted by public school teachers in private schools. It placed great weight on the finding of the trial court that 40 of 41 recipient schools were “pervasively sectarian.”²⁰⁵ And in *Bowen v. Kendrick*,²⁰⁶ the Court considered a challenge to the Adolescent Family Life Act,²⁰⁷ which supplied funding for organizations that provide services and counseling to adolescents. Congress amended the act to require grantees to coordinate their efforts with other institutions, including religious and charitable organizations.²⁰⁸ The act also permitted grants to religious institutions. Although the Court rejected a facial challenge to the constitutionality of the act, it remanded the case for reconsideration of whether any of the grantees were “pervasively sectarian.”²⁰⁹

C. *The Ambiguities in the “No Aid to [Pervasively] Sectarian Institutions” Rule*

Though widely accepted as the definitive standard for the constitutionality of aid to private schools, the *Lemon* test presents

203. *Id.* at 743. The logical error that the Court makes in its equation of “sectarian” schools and a “primary effect of advancing religion” is that it isolates the treatment of individual recipients and looks at *their* purposes, rather than the purpose and effect of the state action toward all recipients. For example, when the state supplies free fire or police protection or library cards, there is no question that the state action has a primary effect that is secular in character. Even though individual institutions may have dominantly or even exclusively religious purposes for *their* use of the benefit, that does not make the benefit as to them much less the benefit to all recipients an advancement of religion.

204. 473 U.S. 373 (1985).

205. *Id.* at 385.

206. 108 S. Ct. 2562 (1988).

207. 42 U.S.C. §§ 3002 to 3002-10 (1982I Supp. III 1985).

208. *Kendrick* 108 S. Ct. at 2567.

209. *Id.* at 2580. One positive sign in the case is the concurring opinion of Justice Kennedy, expressing skepticism that “the term ‘pervasively sectarian’ is a well-founded juridical category.” *Id.* at 2582 (Kennedy, J., concurring).

fundamental inconsistencies. It is almost hopelessly vague, not only about the difference between permissible and impermissible types of aid, but more importantly about how to distinguish eligible from ineligible institutions. The Court seems to take for granted that "sectarian" institutions may not receive state aid. Leaving aside the argument that this decision is itself non-neutral,²¹⁰ two important questions about this standard remain. First, does the term "sectarian" refer to "denominational" religiosity, or simply to "intense" religiosity? Second, can class-wide determinations of "sectarianism" eliminate the need for case-by-case entanglement?

1. Does "Sectarian" Mean "Denominational" or "Intensely Religious"?

The term "sectarian" had already acquired a meaning before the Court began using it as the litmus test for eligibility for state aid. It is not clear that this first meaning was the one the Court intended to carry forward into the aid cases.

When the Court confronted the problem of "sectarianism" in deciding the "school prayer" cases,²¹¹ it was faced with two different but related arguments. There was not only the fear that the state would be involved in favoring religion over nonreligion, but a related fear that organizers of state-sponsored religious exercises would face a herculean task in attempting to avoid a preference for one religion. The second kind of favoritism was termed "sectarianism."²¹² For example, an expert witness in one case testified that the Bible was nonsectarian, but he later admitted that he meant "'non-sectarian within the Christian faiths.'"²¹³ This kind of sec-

210. See McConnell, *supra* note 200 at 437-38.

211. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

212. "Sectarian" is sometimes used in the sociology of religion as a kind of antonym for "ecumenical." Whereas in an "ecumenical" spirit a religious person will attempt to find points of commonality with those whose religious viewpoints differ from his own, the "sectarian" spirit emphasizes differences. P. BERGER, *THE SACRED CANOPY* 163-64 (1967). While not necessarily pejorative in itself the term "sectarian" usually implies a kind of favoritism.

213. *Schempp*, 374 U.S. at 210 (quoting *Schempp v. School Dist. of Abington Township*, 177 F. Supp. 398, 402 (1959)). Similarly, Jefferson distinguished between the support of religion and the support of sectarianism. In planning the curriculum at the University of Virginia, he suggested that there be no professor of divinity, but rather a professor of ethics, who would teach "proofs of the being of a God . . . to which adding the development of these moral obligations, of those in which all sects agree, with a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed common to all sects." *EARLY HISTORY OF*

tarianism provoked much controversy in the nineteenth century public schools.²¹⁴

"Sectarianism" in this sense referred to a partiality of one religion over another.²¹⁵ It seems unlikely that in *Lemon* and subsequent cases the Court was concerned with the denominational preferences of a particular institution. If the "sectarian" Catholic schools in *Lemon* had made the inculcation of religion their primary goal, but had been less concerned with "assur[ing] future adherents to a particular faith"²¹⁶ would that have made a difference in the outcome of the case? One would not think so, but before dismissing the possibility it is worth noting other references to a "denominational" interpretation of sectarianism. In deciding that the college receiving aid in *Hunt v. McNair*²¹⁷ was not sectarian, the Court noted that the percentage of Baptists in the student body, sixty percent, was "roughly equivalent to the percentage of Baptists in that area of South Carolina."²¹⁸ Another reference which might support the "denominational" interpretation of "sectarian" is found in Justice Brennan's dissent in *Lemon*, noted earlier.²¹⁹

On balance, it appears that the Court in the *Lemon* line of cases was not focusing upon the "denominational" character of the institution, but rather upon the intensity of the religious beliefs. In any case, the "denominational" approach is fraught with peril for two reasons. First, the definition of which institutions are excessively "denominational" or "sectarian" will give extremely broad discretion to administrative agencies²²⁰ and trial courts, who are ill-pre-

THE UNIVERSITY OF VIRGINIA AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL 441 (J. Randolph ed. 1856) (quoted in Note, *supra* note 135, at 670).

214. *Schempp*, 374 U.S. at 268-269 (Brennan, J., concurring). "The controversy centered, in fact, principally about the elimination of plainly sectarian practices and textbooks, and led to the eventual substitution of nonsectarian, though still religious, exercises and materials." *Id.*

215. See *supra* note 212.

216. *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970)) (emphasis added).

217. 413 U.S. 734 (1973); see *supra* text accompanying note 202.

218. *McNair*, 413 U.S. at 744.

219. See *supra* note 195. Perhaps an additional source of confusion for the court was the use in the Higher Education Facilities Act of the word "sectarian." See *supra* note 192.

220. The Court's standards require *administrative agencies* and other political bodies to engage in the kind of inquiries heretofore conducted by courts. Wherever the state is otherwise distributing funds on a neutral basis, it apparently must identify "pervasively sectarian" institutions and disqualify them. State departments of education will presumably be expected to conduct the kind of inquiry engaged in by the court in *Lemon*. Now that "per-

pared to handle the complex theological questions involved. Agencies and courts will be prone to inject significant doses of religious bias into the decisionmaking process. Since "sectarian" groups often identify themselves in opposition to "mainstream" trends,²²¹ they are most likely to suffer from the kind of discrimination the first amendment was designed to prevent. The second peril is that once standards are articulated for the identification of a "sectarian" institution, modest institutional changes will blur the boundaries and trigger ongoing skirmishes between funding agencies, recipients, and courts. In any event there will be far more of the "excessive government entanglement with religion"²²² than the Court thought permissible in *Lemon* or *Tilton*. Each of these problems is illustrated in a case which, though it predated *Lemon* and *Tilton* by five years, anticipated the Court's approach with remarkable accuracy.

a. The "Ephemeral" Nature of Sectarianism

In *Horace Mann League v. Board of Public Works*,²²³ the Maryland Court of Appeals reviewed the dismissal of taxpayer challenges to state construction grants for four church-related colleges. The appellate court reversed as to three of the four colleges, finding that the federal constitution²²⁴ prohibited aid to "sectarian" institutions.²²⁵ The court went to some length to attempt a definition of "sectarianism," while at the same time acknowledging that "[w]hether or not an educational institution is sectarian in such a legal sense is a rather elusive matter, being somewhat ephemeral in nature."²²⁶ "[T]he question of sectarianization depends upon a consideration of the observances, themselves, and the mode, zeal, and frequency with which they are made." The court adopted an astonishing standard which required extensive evaluation of the

vasively sectarian" institutions must be identified for purposes of other grants besides education, these determinations may become more frequent and more troublesome. See *supra* note 206-09 and accompanying text. For an early example of an attempt by an administrative agency to cope with constitutional limitations, see Department of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 GEO. L.J. 349 (1961).

221. P. BERGER, *supra* note 212, at 164.

222. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

223. 242 Md. 645, 220 A.2d 51, (1966) *appeal dismissed*, 385 U.S. 97 (1966).

224. The court also considered a challenge under the state constitution but found no violation. *Id.* at 690, 220 A.2d at 76.

225. *Id.* at 684, 220 A.2d at 73.

226. *Id.* at 678, 220 A.2d at 69.

“mode, zeal, and frequency” of religious observances.²²⁷ Fortunately, the court supplemented these broad principles by highlighting a number of “factors” that should be considered in making the final determination.²²⁸

The court’s application of its standard is instructive. Of the four colleges involved, two were affiliated with the Catholic Church, and the court had relatively little difficulty finding them sectarian.²²⁹ The other two colleges, Hood College and Western Maryland College, were relatively similar, and both had received \$500,000 grants. Nonetheless, the court found only Western Maryland to be impermissibly sectarian.

Hood College was affiliated with the United Church of Christ, which had contributed 2.2% of the college’s operating budget. However, the representation of the church in the faculty, student body, and administration were not disproportionate.²³⁰ Hood College apparently required attendance at chapel, but the requirements did not “call for frequent services, with the student being allowed generous ‘cuts’ without excuse.”²³¹ Western Maryland was affiliated with the Methodist Church, which provided “between 2 and 3% of the [operating] budget” of the college.²³² However, whereas Hood College’s “stated purposes in relation to religion are

227. *Id.* at 671, 220 A.2d at 65.

228. *Id.* at 672, 220 A.2d at 65-66.

The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian); (3) the college’s relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college’s memberships and affiliations, religious purposes, and miscellaneous aspects of the college’s relationship with its sponsoring church; (4) the place of religion in the college’s program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college’s own church and the place of religion in the curriculum and in extra-curricular programs; (5) the result or “outcome” of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community.

229. *Id.* at 684, 220 A.2d at 73. One college described its own program as “‘permeated, motivated, enlarged and integrated by the Catholic way of life.’” *Id.* at 680, 220 A.2d at 70.

230. *Id.* at 672-74, 220 A.2d at 66-67.

231. *Id.* at 674, 220 A.2d at 67.

232. *Id.* at 677, 220 A.2d at 68.

not of a fervent, intense, or passionate nature, but seem to be based largely upon its historical background," Western Maryland "characterizes itself as a 'religiously oriented institution' and 'make[s] no bones about the fact that our philosophy at Western Maryland is a Christian philosophy.'" ²³³ The court also found that Western Maryland "makes a conscious effort to integrate religion, and specifically Christianity, with the curriculum and extracurricular life;" ²³⁴ and that "the image of the college in the community is strongly Methodist." ²³⁵ These findings led the court to hold that Western Maryland was "sectarian in a legal sense under the First Amendment." ²³⁶

This case bears close examination because it is one of the few judicial attempts to draw the line between a sectarian institution and one which is church-related but not sectarian. ²³⁷ It initially received some attention by commentators, ²³⁸ whose concerns receded

233. *Id.* at 675, 220 A.2d at 67.

234. *Id.* at 677, 220 A.2d at 68. The court did, however, question the significance of this fact. "Because Methodism does not have the wide range of dogma that one, or more, religions have, there is less specific religious restriction in regard to curriculum, but the school endeavors to provide a religious motivation." *Id.* at 677, 220 A.2d at 68-69.

235. *Id.* at 678, 220 A.2d at 69.

236. *Id.*

237. A similar approach was suggested in a note arguing for "strict neutrality":

Strict neutrality would extend the prohibition of aid to cover schools which in any way promote religion, without requiring that the religious element "pervade" the institution. . . . Characteristics that indicate that a school promotes religion are: rules mandating student attendance at chapel services, admission policies that discriminate on the basis of the religious affiliation of the applicant, inclusion of religious education in the school's academic requirements, and the presence of religious symbols in the classrooms.

Note, *supra* note 167 at 1480-81.

238. Professor Giannella described the case as "an apt illustration" of the danger of using a test of religious fervor to disqualify institutions of higher education from receipt of state aid. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 588-89 (1968). His own solution to the problem was to disqualify only those institutions that did not observe academic freedom, or those that "tend to distort the educational function and operate as a species of religious finishing school." *Id.* at 589. He had two criteria to determine the latter: whether the institution compelled regular attendance at religious functions, and whether a significant number of the student body was preparing for the ministry. *Id.*

As discussed *infra* in section VI, a neutral state policy can and should condition its aid upon the institution's ability to meet requirements that are rationally related to its interests, such as breadth of curriculum, the qualifications of eligible faculty, types of degrees offered, and the like. However, restrictions based upon the ideological orientation of the institution or the religious practices of the students are a form of content-based discrimination, and therefore would be constitutionally impermissible rather than constitutionally required.

Another commentator noted, "Evidence that colleges have heeded the message [in *Horace*

as *Tilton v. Richardson*,²³⁹ and subsequent cases, made clear that colleges were presumed eligible for state aid.

Horace Mann demonstrates the confusion between using a “denominational” test and using an “intensely religious” test.²⁴⁰ Most of all it demonstrates that a determination of “sectarianism” is a hazardous business. Basing the decision in part on community perceptions of whether an institution is “sectarian” invites a bias favoring “mainstream” religious movements. Groups with relatively unpopular views will inevitably be perceived as more “fervent” or “passionate,” whereas those with popular views will appear to be more moderate.²⁴¹ Similarly, institutions whose religious views are relatively harmonious with secular trends will appear to have a “laissez-faire” approach to the curriculum, allowing maximum “academic freedom.” Those institutions whose religious views conflict with secular trends will be more likely to produce an academic curriculum quite different from “mainstream” institutions. In short, since “sectarianism” is largely in the eye of the beholder, the use of such a standard runs a considerable risk of permitting aid to institutions affiliated with “mainstream” religions, but denying aid to those operated by minority religions. This can hardly be defended as a test consistent with the first amendment.

Mann] is plentiful,” and that consequently they have begun trading religion for dollars. Smith, *Emerging Consequences of Financing Private Colleges with Public Money*, 9 VAL. U.L. REV. 561, 578-79 n.79 (1975); see also Comment, *The Establishment Clause and Governmental Aid to Colleges: Origin and Evolution of the Establishment Clause*, 11 ST. LOUIS U.L.J. 464, 472 (1967) (“[I]s a school with religious affiliations to be eligible for state funds only if it fails to do that for which it exists?”). The case is also discussed, without particular attention to the determination of “sectarianness,” in Costanzo, *Wholesome Neutrality: Law and Education*, 43 N.D.L. REV. 605 (1967). One commentator reviewed the case approvingly, noting that “[t]he drawing of [the line between sectarian and secular] like the drawing of most lines is difficult, and in such a situation it is almost always possible to urge that the line should have been drawn somewhat differently.” Davidow, *Governmental Aid to Church-Affiliated Colleges: An Analysis of a Possible Answer to the Constitutional Question*, 43 N.D.L. REV. 659, 686 (1967).

239. 403 U.S. 672 (1971); see *supra* text accompanying notes 191-97.

240. For example, by emphasizing that Western Maryland College was perceived as “strongly Methodist,” the Court’s opinion suggests that a close identification with traditional denominational lines is an index of sectarianism. On the other hand, most of the other factors are simply related to how strongly the religious purposes of the college are emphasized in word as well as in deed.

241. For example, in *Horace Mann*, Judge Prescott noted the more permissive and secular orientation of Methodist “dogma.” See *supra* note 240; see also Gianella, *supra* note 238, at 589; cf. Note, *supra* note 6, at 1625-31 (discussing refusal of Pennsylvania courts to recognize MOVE organization as religion).

b. Administration of State Determinations

It might be thought that potential biases could be limited by the development of more specific, objective standards for (pervasive) "sectarianism." Such an approach generates the second major flaw in the *Horace Mann* case, which is the need for continued monitoring to ensure the institution's compliance with the standards. If one examines the critical differences between the eligible Hood College and the ineligible Western Maryland College, they were mutable characteristics which included statements in official literature about the purpose of the college, chapel attendance policies, and the make-up of college trustees or faculty. Western Maryland College could easily make itself look more like the eligible Hood College.²⁴² Reversing the scenario, suppose Hood College is found eligible in Year 1, but in Year 2 begins to look more like Western Maryland.²⁴³ The more specific and objective the criteria, the greater the temptation to make cosmetic changes to gain or retain eligibility.²⁴⁴ As in determinations of qualification under various Internal Revenue Code provisions,²⁴⁵ there would likely be a running battle of form versus substance. Some colleges have already been encouraged to "trade religion for dollars" and have done so.²⁴⁶ The involvement of the state into quintessentially theological issues is strikingly reminiscent of the situation posed in *Presbyterian Church v. Hull Church*,²⁴⁷ in which Justice Brennan wrote that "[i]f civil courts undertake to resolve such controversies . . . , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of

242. See *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974) (court disqualified several private colleges from receiving state aid because they could not meet an eight-part standard of religious entanglement, but suggested the institutions "could again become eligible by eliminating their particular infirmities.").

243. These changes might be occasioned by theological changes within the institution (such as a resurgence in orthodoxy), or as part of the college's attempt to make itself more appealing to its church constituency.

244. Professor Greenawalt recounts how he and Professor Gellhorn advised Fordham University to make certain changes to ensure that it would be viewed as "nonsectarian" for purposes of state funding. Fordham followed their advice "partly for independent reasons," and (apparently) lived happily ever after. Greenawalt, *Constitutional Limits on Aid to Sectarian Universities*, 4 J.C. & U. L. 177, 180-81 (1977); see also Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 704-05 n.51 (1979).

245. See, e.g., 1 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 4.3.3 at 4-35 to 4-44 (1981).

246. See *supra* note 244.

247. 393 U.S. 440 (1969); see *supra* text accompanying notes 69-74.

purely ecclesiastical concern.”²⁴⁸

2. Can Classwide Determinations Avoid Entanglement?

One obvious way to avoid the difficulties of case-by-case determination of sectarianism would be to determine the constitutionality of aid on a classwide basis.²⁴⁹ Indeed, it appears that the Court in fact did so in *Lemon* and *Tilton*. The Court’s blanket judgment holds that schools may not receive aid, because in the aggregate they tend to be sectarian, but colleges in most cases may, because in the aggregate they tend not to be. This “broad brush”²⁵⁰ approach may appear to resolve the problems illustrated by a case like *Horace Mann*, but it also creates its own difficulties.

First, this approach reduces, but does not eliminate, the necessity of determining the sectarianness of institutions. Blanket judgments present less opportunity for entanglement than individual determinations for each institution, but they still require a definition of “sectarian” as it applies to a group of institutions.

The second problem with classwide determinations is that there is no clear method of defining the group or class. For example, the possibility exists that a state might institute a “voucher” system by which parents of school-age children would receive one voucher for each child, redeemable by any school satisfying the compulsory education requirements of that state.²⁵¹ On what basis could a court decide whether the “class” of aid recipients “tended to be

248. *Hull Church*, 393 U.S. at 449. Professor Giannella echoed precisely the same concerns as applied to the *Horace Mann* case. See Giannella, *supra* note 238 at 589.

249. See, e.g., Note, *State Aid to Parochial Schools: A Quantitative Analysis*, 71 GEO. L.J. 1063, 1086-88 (1983).

250. Professor Giannella thought such an approach was necessary precisely to avoid entanglement. See *supra* note 187.

251. This possibility was suggested soon after *Lemon* was decided. Morgan, *supra* note 187, at 31-36. Morgan’s pessimistic view of the constitutionality of voucher plans may have been changed by *Mueller v. Allen*, 463 U.S. 388 (1983), discussed *supra* at note 185. The history of voucher plans is discussed in Comment, *The Use of Public Funds By Private Schools via Educational Vouchers: Some Constitutional Problems*, 3 PAC. L.J. 90 (1972). For more recent discussions of voucher plans, see Note, *Rotunda, The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C.L. REV. 917, 929-934 (1987); Note, *Education Vouchers and Tuition Tax Credits: In Search of Viable Public Aid to Private Education*, 10 J. LEGIS. 178 (1983); Public Funding of Private Education: A Public Policy Analysis, 10 J. LEGIS. 146 (1983). For a defense of the constitutionality of voucher plans and tuition tax credits, even under existing law, see Note, *supra* note 244; Note, *Education Vouchers: The Fruit of the Lemon Tree*, 24 STAN. L. REV. 687 (1972). But see Note, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L.J. 1061 (1980).

sectarian?" Suppose that Wyoming instituted such a program, but limited it to providing vouchers for private schools; should the Court in reviewing the constitutionality of the program look only at the percentage of private schools in Wyoming that are sectarian? What about the percentage of schools expected to be sectarian once the program has been in existence for five years?²⁵² One might argue that the class of schools to be considered should be private schools nationwide. Would the Court be content to rule on one state at a time, thereby creating the possibility that one state would have its program approved while another would not because of different percentages of sectarian schools? On the other hand, would the Court prefer to have all states represented in the litigation so that a final decision could be made?

To compound the problem, what percentage of sectarian schools—again, an extremely difficult animal to identify—should suffice to doom an otherwise constitutional voucher system? A footnote in *Aguilar v. Felton*²⁵³ suggests that the number might be as low as ten to twenty percent.²⁵⁴ If so, a state program admittedly designed to promote secular goals would be struck down as unconstitutional because a small minority of the recipients would be furthering a religious purpose.²⁵⁵ Conversely, if a large percentage of the recipients were permitted to be sectarian, perhaps thirty to forty percent or more, then the whole concept of a strict approach in not aiding sectarian institutions would be abandoned in the process.

252. More private schools may open, if a voucher system sharply reduced the financial expense of starting them. A voucher system's defender might argue that most private schools now are religious, because the great expense of operating such a school means that only those with the most urgent of motives such as religious conviction will spend the extra dollars required for private school. With a voucher system, on the other hand, many more parents would be able to afford private schooling, and it is likely that their religiosity would be less intense. Of course, only after some experience with such a system assuming the court would permit it to operate in the first place would more accurate data be available.

253. 473 U.S. 402 (1985).

254. *Id.* at 412 n.8. The court in that footnote cited with approval a remark in Justice Friendly's opinion for the court of appeals, in which he implied that unless "all, or almost all, New York City's parochial schools receiving Title I aid have . . . abandoned 'the religious mission that is the only reason for the schools' existence, the aid would be unconstitutional.'" *Id.* (quoting *Felton v. Secretary, United States Dep't of Educ.*, 739 F.2d 48, 70 (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 650 (1971) (Brennan, J., dissenting))).

255. Recall that one vice of this facial or "class-wide" determination is that the Court cannot save the clearly secular and strike down the "sectarian"; avoiding the identification of particular recipients as "sectarian" is the whole purpose for using this method rather than a case-by-case approach.

Even if sectarian schools comprised a large fraction of all private schools, an enterprising legislator could follow the lead of *Mueller v. Allen*,²⁵⁶ and expand the class to reduce the percentage of sectarian schools below any conceivable threshold. Suppose, for example, that a state dropped its block funding of public schools and instituted a voucher program that provided tuition grants to parents of children in *any* school, public or private; the class, as in *Mueller*, would be increased five or tenfold. Since (at least in the beginning) a very high percentage of the schools redeeming the vouchers would be public schools, how could it be found that the recipients "tended to be sectarian"?²⁵⁷ The Court has previously warned that it is on the lookout for "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court,"²⁵⁸ but it is difficult to see how it could strike down such a plan based on the approach it has taken to date. The Court may be forced to swallow a camel after having strained so long at gnats.

In addition, a majority of the Court has recently expressed opposition to determining the constitutionality of a statute based upon the identity of the recipients; in *Mueller*, the Court noted that it would be "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."²⁵⁹ In *Bowen v. Kendrick*,²⁶⁰ the Court also rejected a facial challenge to a statute whose beneficiaries included religious organizations, but remanded for further consideration to determine whether any of the beneficiaries could be characterized as "pervasively sectarian." The opinion declared that the remedy for such a finding by the trial court would be to disqualify the particular grant in question, rather than the statute as a whole.²⁶¹ Thus, the use of a class-wide remedy to avoid case-by-case determinations of

256. 463 U.S. 388 (1983); *see supra* note 185.

257. Such a case would be similar to *Mueller* where a tax deduction was available to *all* parents; in fact, the chief objection in *Mueller* was that the benefit was much greater for private school than public school parents. *Mueller*, 463 U.S. at 400-01. If a voucher were provided that was redeemable at either a public or private school, the benefits could be made equal. *See supra* note 185.

258. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986) (quoting *Committee for Pub. Educ. & Religious Library v. Nyquist*, 413 U.S. 756, 785 (1973)).

259. 463 U.S. at 401.

260. 108 S. Ct. 2562 (1988); *see supra* text accompanying notes 206-09.

261. "Should the Court [upon remand] conclude that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval." *Id.* at 2581.

"sectarianness" may not be a viable option.

In summary, the apparent advantages of determining "sectarianness" on a class-wide rather than case-by-case basis disappear upon further inspection. Either approach appears fraught with intractable difficulties in implementation. Aside from the question of whether sectarian schools *ought* to be treated separately,²⁶² the problems of *identifying* them for purposes of that separate treatment appear insuperable, if the Court's principle of avoiding excessive entanglement is to be honored.

V. ENTANGLEMENT WITH RELIGION BY EXEMPTING BELIEVERS FROM OTHERWISE VALID LAWS

Just as the Court's preoccupation with the effect of state aid for education led to the adoption of the prohibition of aid to religiously motivated institutions, the preoccupation with the effect of state action on individuals has led the Court to require exemptions for religious believers from otherwise valid state laws. Like the "aid to parochial schools" cases, the "free exercise" cases have followed a tortuous path.

A. *The Belief/Action Distinction and Its Decline*

The Court's treatment of the free exercise clause began on a sensible note. In the first case to address the merits of a free exercise claim, *Reynolds v. United States*,²⁶³ the Court rejected the argument that religiously motivated acts required special privileges. Reynolds argued at his trial on charges of polygamy that he was justified in acting "in conformity with what he believed at the time to be a religious duty."²⁶⁴ An instruction to that effect was refused, and Reynolds appealed his conviction. A unanimous Court²⁶⁵ held that Reynolds' religious beliefs were no defense, citing Jefferson's distinction between "the profession or propagation of principles"

262. For an argument that religious schools cannot be denied aid without in effect penalizing them for their beliefs, see Paulsen, *supra* note 17, at 356.

263. 98 U.S. 145 (1878); see also *Permoli v. First Municipality*, 44 U.S. (3 How.) 589 (1846). Earlier cases, such as *Permoli* had raised free exercise issues, but had been dismissed because of the Court's holding that the first amendment limited federal power only and did not affect the actions of the states or subdivisions thereof.

264. 98 U.S. at 162.

265. Justice Field differed on the issue of the admission of certain testimony against Reynolds, yet he concurred with the majority on the free exercise issue. *Id.* at 168 (Field, J., concurring).

on the one hand the protection of which is the essence of religious liberty and the time when "principles break out into overt acts against peace and good order" on the other.²⁶⁶ Jefferson intended the "wall of separation between Church and State"²⁶⁷ to be incorporated in the first amendment. This meant that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."²⁶⁸

In addition, the Court went on to consider the alternate argument that, assuming Congress had authority to outlaw polygamy,²⁶⁹ special consideration should nevertheless be given to polygamists motivated by religious beliefs. The Court rejected this theory:

Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.²⁷⁰

Reynolds thus generated two principles which could serve to simplify the analysis of conflicts between religious and secular authority. The first was that the government's disability from regulating beliefs was not a limitation on its ability to regulate actions.²⁷¹ The second was that claims for exemption based upon religious motivation should be viewed skeptically, since the assertion of a spiritual authority superior to the state authority posed a serious threat to secular government.²⁷² While the first amendment jurisprudence of the twentieth century consigned both principles to the dust bin of history, it is time to consider rehabilitating them.

266. *Id.* at 163.

267. *Id.* at 164.

268. *Id.*

269. The Court had little difficulty deciding that since "from the earliest history of England polygamy has been treated as an offense against society," *id.* at 164, its prohibition was "within the legislative power of Congress." *Id.* at 166. This observation, while falling short of proof that polygamy is *malum in se*, was at least relevant to the question of whether Congress was out to "get" the Mormons. Since the prohibition of polygamy long predated the Mormons' practice of it, the latter conclusion would be difficult to reach.

270. *Id.* at 166-67.

271. "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164.

272. *Id.* at 166.

In *Cantwell v. Connecticut*,²⁷³ the belief/action distinction was maintained, although the restatement of the principle opened the door to its later dismantling. The case was decided on broad first amendment grounds, rather than upon any specific feature of the religion clauses. However, the Court's opinion contained two significant statements. First, the Court held that the first amendment's prohibitions applied to the states as well as Congress because of the due process clause of the fourteenth amendment.²⁷⁴ Second, the court restated the belief/action distinction, and in doing so created ambiguities that were later translated into affirmative action principles: "Thus the [first] 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."²⁷⁵

Cantwell moved beyond a simplistic belief/action distinction by recognizing that beliefs are frequently expressed through physical action such as preaching. The Court acknowledged the state's power to regulate conduct in the public interest, but proscribed *content-based* discrimination against, and perhaps even for, religious activity.²⁷⁶ Thus the *Reynolds* distinction could be preserved with this gloss: the expression of religious belief is entitled to the same stringent protections as other first amendment expression, but actions *motivated* by those beliefs are not so protected.

However, this interpretation of *Reynolds* was ultimately replaced by the standard announced in *Sherbert v. Verner*.²⁷⁷ In *Sherbert*, a majority of the Court took the step of saying that not only are beliefs given more or less absolute protection, but actions *motivated* by those religious beliefs merit as close to absolute protection as possible. Thus, conduct motivated by religious beliefs was to be honored so long as there was no compelling state interest

273. 310 U.S. 296 (1940). *Cantwell* was convicted of violating a Connecticut statute prohibiting solicitation for religious, charitable or philanthropic causes unless the cause had been approved. The conviction was reversed because it created a prior restraint upon expression of protected views. *Id.* at 304. *Cantwell* was also convicted of inciting a breach of the peace for playing a phonograph record which was offensive to Catholics. Because such conduct presented no "clear and present danger to a substantial interest of the State," it too was protected, and the conviction reversed. *Id.* at 311.

274. *Id.* at 303.

275. *Id.* at 303-04.

276. The Court was not suggesting that *Cantwell's* rights derive from the fact that he is engaged in *religious*, as opposed to secular, activity; *Cantwell's* rights flowed from his engaging in protected first amendment expression. *See id.* at 303-11.

277. 374 U.S. 398 (1963); *see infra* text accompanying notes 302-11.

opposing such action.²⁷⁸ This development is traced in the following pages, but it is important to note that there are actually three distinct categories to be considered: first, the beliefs themselves; second, the expression of those beliefs (such as through preaching); and third, the actions motivated by those beliefs. The Court in *Cantwell* does not appear to have intended to invest the third class with the protection of the "compelling state interest" test, but such was to be the interpretation placed on it by *Sherbert*.

*West Virginia Board of Education v. Barnette*²⁷⁹ sowed the seeds for the affirmative action approach to the free exercise clause. *Barnette* appealed his conviction for refusing to permit his daughter to recite the Pledge of Allegiance. The majority did not rely upon religious liberty in particular, but rather on the proposition that the first amendment protects silence as well as speech.²⁸⁰ As such, *Barnette* would be a sensible but not a particularly significant opinion for purposes of the religion clauses. Initially, it is difficult to understand Justice Frankfurter's vehement dissent from the opinion. Frankfurter suggested that the attitude of "judicial humility"²⁸¹ required the court to defer to the legislature's judgment about the need for this patriotic measure. Frankfurter's position is perhaps more understandable when viewed in light of the concurring opinions of Justices Black and Douglas.²⁸² These justices chose to emphasize the specifically religious nature of the objection to the flag salute and to broaden the protection of the religion clauses of the first amendment to encompass *actions* based on religious belief as well as the beliefs themselves (including the expression thereof).²⁸³

This assertion of a special status for religious beliefs apparently triggered the major thrust of Justice Frankfurter's dissent. He thought that, while the state could not discriminate against religion, the state was not required to refrain from pursuing valid in-

278. 374 U.S. at 403.

279. 319 U.S. 624 (1943). The difference between the two opinions is summarized in Justice Jackson's majority opinion in *Barnette*; the problem in *Minersville School Dist. v. Gubitis*, 310 U.S. 586 (1940), was that the parties had "assumed . . . that power exists in the State to impose the flag salute discipline upon school children in general." *Id.* at 635.

280. *Id.* at 632-34.

281. *Id.* at 667 (Frankfurter, J., dissenting).

282. They also joined the majority opinion.

283. *Barnette*, 319 U.S. at 643-44 (Black and Douglas, J.J., concurring). Justices Black and Douglas noted that they "are substantially in agreement with the opinion just read [the majority opinion], but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view." *Id.* at 634.

terests because of an adverse effect upon religion. "The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong."²⁸⁴ If the propriety of the state action were conceded, and an individual only sought excuse from compliance because of religious scruples, it would force the court to determine what scruples were religious. To do so would "resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid."²⁸⁵

Justice Frankfurter's analysis is prophetic:²⁸⁶ in *Sherbert* and its progeny²⁸⁷ the Court adopted both errors cited by Justice Frankfurter. First, it permitted religious beliefs to dictate the enforceability of secular law. Second, it necessitated the Court's definition of what constitutes a "religion" so as to qualify for exemption.²⁸⁸

The assertion that religiously motivated conduct is entitled to first amendment protection blossomed²⁸⁹ in *Braunfeld v. Brown*,²⁹⁰ and *McGowan v. Maryland*, which were decided on the same day.²⁹¹ Both cases challenged the constitutionality of Maryland's Sunday Closing Laws. In *McGowan* the Court held there was no

284. *Id.* at 654 (Frankfurter, J., dissenting).

285. *Id.* at 658.

286. He seemed quite conscious of the fact that the decisive cases were to come:

I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after.

Id. at 660-61. He seemed particularly concerned for the potential of the doctrine of special rights for religiously motivated conduct to justify aid to parochial schools, a problem that the Court first addressed in *Everson*. See *supra* text accompanying notes 136-58. For a sympathetic view of Justice Frankfurter's opinion in the *Gobitis* case, see Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257 (1978).

287. See *infra* text accompanying notes 302-11.

288. *Id.*

289. In an intervening case, *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court rejected the contention that a statute burdening religious exercise was invalid unless a "clear and present danger" was shown. *Id.* at 167 (quoting *Schenck v. U.S.*, 249 U.S. 47 (1919)). The case is murky since it involved the regulation of the activities of children rather than adults. *Id.* at 169-70. Also, three of the dissenters, Justices Jackson, Roberts and Frankfurter, were purporting to be bound by the an earlier opinion of *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which street preaching was held to have the same constitutional status as conventional worship in a church. Justice Murphy also dissented, finding the inclusion of street preaching within the category of "child labor" to be the prohibition of religion "under the guise of enforcing its child labor laws." *Prince*, 321 U.S. at 172.

290. 366 U.S. 599 (1961).

291. 366 U.S. 420 (1961).

violation of the establishment clause, since the statute was designed to serve the secular purpose of providing a common day of relaxation. Although the origin of Sunday Closing Laws was clearly religious, the secular purpose had superseded the religious one: "The cause is irrelevant; the fact exists."²⁹²

The problem in *Braunfeld* was different, since plaintiff claimed that even if the laws were permissible as applied to those who recognized no other Sabbath, they impermissibly restricted Jews and others who recognized a different Sabbath than Sunday. While the plurality²⁹³ denied Braunfeld's requested relief, it restated the test for free exercise challenges in a form closer to the equation of religiously motivated conduct with the expression of beliefs: "The freedom to hold religious beliefs and opinions is absolute. . . . However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."²⁹⁴ The opinion differentiated cases where the burden on religion is *direct*, for example where a statute makes a religious practice unlawful, from cases where the burden on religion is merely *indirect*, making the practice of religion less convenient or more expensive. Where a case such as Braunfeld's falls into the latter category, the statute is valid "unless the State may accomplish its purpose by means which do not impose such a burden."²⁹⁵ Citing numerous practical problems associated with granting an exemption,²⁹⁶ the Court sustained the statute.

Justices Douglas, Brennan and Stewart dissented in separate opinions. Justice Brennan suggested that the "compelling state interest" test applied in *Barnette*²⁹⁷ should be used to evaluate

292. *Id.*

293. Chief Justice Warren's opinion was joined only by Justices Black, Clark, and Whittaker; Justices Frankfurter and Harlan concurred in the judgment in a separate opinion.

294. *Braunfeld*, 366 U.S. at 603-04.

295. *Id.* at 607.

296. Twenty-one of the thirty-four jurisdictions that had Sunday Closing laws granted exemptions for Sabbatarians. *McGowan*, 366 U.S. at 514. This seems to contradict the plurality's conclusion that the State could not accomplish its purpose if it permitted the requested exemption.

297. See *supra* text accompanying notes 279-87. Justice Brennan was applying the compelling state interest test not to the expression of protected views, such as preaching or, as in *Barnette*, the correlative refusal to express such views but rather to conduct *motivated* by religious beliefs. A colorable argument might be made that in fact Justice Brennan viewed the Sunday Closing Laws as applied to Jews and other Sabbatarians as a kind of penalty or prohibition of the worship activity itself. However, it seems more likely that he was prepared to say that because Braunfeld's desire to work on Sunday was motivated by his belief in worship on Saturday, it was subject to the compelling state interest test. In any

Braunfeld's claim.²⁹⁸ Since no evidence had been produced that the jurisdictions granting exemptions²⁹⁹ for Sabbatarians had experienced greater difficulties than those not granting exemptions, the Court's judgment "exalted administrative convenience" above religious freedom.³⁰⁰

B. *Sherbert and the Protection of Religiously Motivated Conduct*

Justice Brennan's dissenting position in *Braunfeld v. Brown*³⁰¹ was transformed into a majority opinion in *Sherbert v. Verner*,³⁰² decided two years later. Sherbert, a Seventh-day Adventist, applied for unemployment compensation when she was unable to find employment not requiring her to work on Saturday. South Carolina's Unemployment Compensation Act provided that a claimant was ineligible for benefits if she failed "without good cause" to accept work when offered. Because Sherbert failed to accept employment requiring her to work on Saturday, the Employment Security Commission denied her claim, and the South Carolina Supreme Court affirmed.³⁰³ The United States Supreme Court reversed and remanded.³⁰⁴

Justice Brennan's opinion³⁰⁵ provided a new version of the belief/action distinction: "religious *beliefs* as such"³⁰⁶ may not be regulated but conduct "prompted by religious beliefs," while "not totally free from legislative restrictions,"³⁰⁷ is subject to substantially the same protection that is afforded to other first amendment expression. Citing *NAACP v. Button*,³⁰⁸ the Court held:

event, as we shall see in *Sherbert*, the *Barnette* limitation that the compelling state interest test applies to the *expression* of religious views, not activities motivated by them was not carried forward. See *infra* text accompanying notes 302-11.

298. *Braunfeld*, 366 U.S. at 611-12 (Brennan, J., dissenting).

299. See *supra* note 296.

300. 366 U.S. at 615 (Brennan, J., dissenting).

301. 366 U.S. 599, 610-16 (1961) (Brennan, J., dissenting).

302. 374 U.S. 398 (1963).

303. *Id.* at 401.

304. *Id.*

305. Chief Justice Warren and Justices Black, Goldberg and Clark joined the opinion; Justices Douglas and Stewart concurred.

306. 374 U.S. at 402 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) (emphasis added).

307. *Id.* at 403 (quoting *Braunfeld*, 366 U.S. at 603).

308. 371 U.S. 415, 438 (1963).

If . . . the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because [Sherbert's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ." ³⁰⁹

Anticipating perhaps that this standard might appear novel, Justice Brennan attempted to demonstrate that wherever regulation of religiously motivated conduct had been permitted in the past, it "invariably posed some substantial threat to public safety, peace or order."³¹⁰ Where there is no such threat, and the Court found none in Mrs. Sherbert's case,³¹¹ the "compelling state interest" test applies.

This approach presented two difficulties. The first and most obvious was the need to distinguish *Braunfeld*; the Court's answer was that in *Sherbert* the state could pay the unemployment claim and still achieve its objective, whereas in *Braunfeld* an exemption "would have rendered the entire statutory scheme unworkable."³¹² A second and perhaps more serious question was whether the special solicitude required for religion in *Sherbert* could be reconciled with the prohibition against such solicitude decreed the same day in *Abington School District v. Schempp*.³¹³ In *Schempp*, the Court held that Bible reading or recitation of The Lord's Prayer in public schools violated the establishment clause. Justice Brennan denied that requiring an exemption for Mrs. Sherbert constituted an establishment of religion; it reflected "nothing more than the govern-

309. 374 U.S. at 403.

310. *Id.*

311. "Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation." *Id.*

312. *Id.* at 409. This distinction is not persuasive, given the common practice of statutory exemptions. See *supra* note 296. On this point Justice Stewart could not agree with the majority opinion, and while concurring in the result, he thought that *Braunfeld* should be overruled. *Id.* at 418 (Stewart, J., concurring). Indeed, *Braunfeld* was a more compelling case for an exemption because it involved a criminal statute and the prospect of forfeiting one's livelihood. In *Sherbert*, the maximum penalty was a loss of 22 weeks of compensation payments. Justice Harlan also was not persuaded by the distinction, and dissented in an opinion joined by Justice White.

313. 374 U.S. 203 (1963). Justice Stewart complained that the "mechanistic concept of the Establishment Clause" as adopted in *Schempp* (from which Justice Stewart was the lone dissenter) would outlaw the favorable treatment of *Sherbert*, and was "historically unsound and constitutionally wrong." *Sherbert*, 374 U.S. at 415 (Stewart, J., dissenting).

mental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."³¹⁴ This is the quintessential statement of the "affirmative action" approach to neutrality, both in result or effect.

In addition to raising questions about distinguishing those forms of accommodation of religion that are required from those that are forbidden,³¹⁵ this case entails the very kind of "entanglement" courts should avoid. The Court stressed that special treatment for Mrs. Sherbert was acceptable because this was not "a case in which an employee's religious convictions serve to make him a nonproductive member of society."³¹⁶ Justice Harlan in dissent targeted this comment as an illustration of precisely what was wrong with the majority opinion:

[S]urely . . . the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartanburg had been gainfully employed, or if the appellant's religion had prevented her from working on Tuesdays instead of Saturdays. Nor can the Court be suggesting that it will make a value judgment in each case as to whether a particular individual's religious convictions prevent him from being "productive." I can think of no more inappropriate function for this Court to perform.³¹⁷

The Court's standard leaves no real escape from Justice Harlan's criticism. First, by making *religious* belief the touchstone of a constitutional claim for exemption, the Court has inevitably required some determination of whether the claimant's beliefs are religious.³¹⁸ Second, the test appears to require some balancing between the nature of the burden placed upon religion and the nature of the state interest which must be sacrificed in order to accommodate the religious beliefs. In both areas, courts will be required to measure and evaluate the sincerity, weight and probably

314. 374 U.S. at 409 (1963).

315. *Id.* This distinction makes it crucial whether a case is treated as a "free exercise" or "establishment" case. *See supra* note 50.

316. 374 U.S. at 410 (citing an earlier footnote indicating that most Seventh-day Adventists in the Spartanburg area were employed).

317. *Id.* at 420-21 n.2 (Harlan, J., dissenting). Justice Harlan's comments were recently mirrored by Justice O'Connor's majority opinion in the *Indian Cemetery* case. *See supra* text accompanying note 124.

318. *See infra* text accompanying notes 331-36.

the social worth of the believer's views.³¹⁹

The seed planted by *Sherbert* burst into flower in *Wisconsin v. Yoder*,³²⁰ which best illustrates the difficulties with the "affirmative action" approach. James Yoder was convicted of violating the Wisconsin compulsory attendance statute, requiring parents of any child between ages seven and sixteen to enroll their children in school. At trial, Yoder presented evidence of the tenets of his Old Order Amish. The Amish believed that "by sending their children to high school, they would . . . endanger their own salvation and that of their children."³²¹ Expert testimony addressed "the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today."³²² One expert concluded "that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society."³²³ The trial court denied Yoder's motion to dismiss based on the free exercise claim, but the Wisconsin Supreme Court reversed. On appeal, the United States Supreme Court affirmed.³²⁴

Significantly, the entire Court³²⁵ endorsed the standard adopted in *Sherbert*: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the

319. Despite the Court's attempt to link religiously motivated conduct to other forms of "expression" protected as speech by the first amendment, the fit was by no means perfect, as was quickly demonstrated in *Gillette v. United States*, 401 U.S. 437 (1971). *Gillette* was a "selective conscientious objector" and challenged the constitutionality of § 6(j) of the Military Selective Service Act of 1967, which required claimants to be "opposed to war in any form" rather than a specific war. Justice Marshall's opinion stated that the free exercise clause forbids "neutral prohibitory or regulatory laws having secular aims . . . only [where] the burden on First Amendment values is not justifiable in terms of the Government's valid aims." 401 U.S. at 462. As applied to *Gillette*, the Court stated that "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned." *Id.*

320. 406 U.S. 205 (1972).

321. *Id.* at 209.

322. *Id.*

323. *Id.* at 212. This expert testimony was "uncontradicted." *Id.* at 209.

324. *Id.* at 207.

325. Justices Stewart, White, and Brennan wrote separately, but also joined the opinion of the Court. *Id.* at 237 (White, J., concurring). Justices Powell and Rehnquist took no part in the consideration or decision of the case. Only Justice Douglas dissented, but not from the application of the *Sherbert* test. His concern was that the majority's analysis "assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other." *Id.* at 241 (Douglas, J., dissenting). He thought the case should be remanded to canvass the children's views. *Id.* at 246 (Douglas, J., dissenting).

free exercise of religion.”³²⁶ Since there was little dispute that the Wisconsin law burdened the exercise of the Amish religion, the Court focused on whether the state’s interests were compelling. Before turning to that issue, the Court considered the argument that granting an exemption would constitute a forbidden establishment of religion. The Court acknowledged that risk, but found it important to adopt a flexible and realistic approach in the application of the religion clauses.³²⁷ The Court quoted its self-congratulation in *Walz*: “[W]e have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.”³²⁸

Turning to the “compelling state interest” inquiry, the Court considered the two objectives of compulsory high school education proffered by the state. Such education prepared citizens (1) to participate “effectively and intelligently in our open political system,” and (2) to be “self-reliant and self-sufficient.”³²⁹ The Court held that neither of these objectives was defeated by granting an exemption, since the Amish culture produced “a highly successful social unit,” whose members “are productive and very law-abiding members of society.”³³⁰

In explaining the unique factual pattern of the *Yoder* case, the Court made revealing comments about the nature of the rule it was applying. First, “[i]t cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life.”³³¹ Second, the Amish had “convincingly demonstrated” that the state’s action posed “hazards” to their “communities and their religious organization.”³³²

In other words, the two errors which Justice Frankfurter had warned of in his dissenting opinion in *Barnette* had now been unanimously embraced. First, theological doctrine was now determining the enforceability of state law; second, the Court was now

326. *Id.* at 215.

327. *Id.* at 221.

328. *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 672 (1970)).

329. *Id.*

330. *Id.* at 222.

331. *Id.* at 235.

332. *Id.*

required to measure the pedigree, sincerity and worth of the individual's belief system.³³³ For example, it appears critical to the Court's opinion that the Amish thought *salvation* was at stake in the contest between milking cows and programming computers. Their claim for exemption would have been weakened if, like Mohandas Gandhi, they had only believed that manual labor helped improve one's *karma*, and thereby reduced one's time on the wheel of rebirth.³³⁴ Similarly, the Court made it excruciatingly clear that the history of the Amish as a "highly successful social unit" was indispensable. Other parents whose religions were less than one hundred years old (or that were not suitable material for *National Geographic*) should not trouble their school boards with requests for exemption.³³⁵ As Justice Harlan posed the question in *Sherbert*, is there any more inappropriate function for a Court to perform than to pass judgment on the pedigree or social value of a religion?³³⁶

The case of *Thomas v. Review Board*³³⁷ has been noted in reference to the Court's reluctance to resolve theological controversies.³³⁸ The case illustrates that the affirmative action approach will intensify rather than diminish the need to make the distinctions the Court said it wanted to avoid. In *Thomas* the Court for the first time made it explicit that "only beliefs rooted in religion are protected by the Free Exercise Clause."³³⁹ It then becomes critical to determine whether the beliefs held by people like Welsh³⁴⁰

333. 406 U.S. 205.

334. For a discussion of *karma* see 8 ENCYCLOPEDIA BRITANNICA, *Hinduism* 875 (15th ed. 1974). For the importance of the spinning wheel to Gandhi's political and religious beliefs, see E. ERIKSON, *GANDHI'S TRUTH: ON THE ORIGINS OF MILITANT NONVIOLENCE* 260 (1969).

335. Although the Court's primary target is groups whose objections are based on "progressive" i.e., secular beliefs, it is not simply a religious/secular distinction. The Court also spends considerable time stressing the historical tradition represented by the Amish, suggesting that even a group with religious reasons for preferring the Amish form of existence might have difficulty under the Court's standards if their views were of recent origin. See 406 U.S. at 235.

336. See *supra* text accompanying note 317. The Court's analysis would not be misplaced if it were in response to a legislative determination that the Amish be exempted from otherwise valid laws. Exemptions as a matter of legislative grace (which still must be enforced nondiscriminatorily) are considered below. See *infra* text accompanying notes 341-50.

337. 450 U.S. 707 (1981).

338. See *supra* text accompanying notes 106-10.

339. 450 U.S. at 713 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). This statement should come as no surprise, since one could hardly contend that the first amendment, whose guarantee is the protection of the free exercise of religion, could create freedom for actions *not* based upon religion.

340. See *supra* text accompanying notes 103-05.

or Seeger³⁴¹ are religious. The beliefs of Seeger and Welsh were treated as religious for purposes of interpreting Congress's intent in enacting the Selective Service Act.³⁴² *Seeger* and *Welsh* exemplify the Court's aversion to differentiating among theistic religious beliefs, nontheistic religious beliefs, beliefs which "occupy the same place"³⁴³ in one's life as traditional religious beliefs and non-religious beliefs. If this is so, what is to be done with the Court's requirement that for free exercise purposes the belief must be religious? Consider the following passage:

One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.³⁴⁴

It seems unlikely that someone like Welsh, who refused to claim that his beliefs were religious, would qualify for free exercise exemption. But if a person uses the magic word "religious," does the Court's standard shift the burden of proof to the state to show an individual's belief to be "bizarre" or "clearly nonreligious in motivation"? How can that determination avoid significant entanglement? Would Paul Tillich's students³⁴⁵ be qualified to form expert opinions as to which concerns are sufficiently "ultimate" for first amendment protection?

C. Recent Trends

As noted above, the Court has recently begun to question the soundness of the holding in *Sherbert*.³⁴⁶ The rejection of the Army captain's claim for an exemption in *Goldman v. Weinberger*³⁴⁷ might be attributable to the unique circumstances of the military. However, in *Bowen v. Roy*,³⁴⁸ a divided Court refused to exempt an

341. See *supra* text accompanying note 91-102.

342. Justice Harlan could not agree that Congress intended to exempt persons with beliefs like Welsh's, but felt that the "neutrality" principle required that no distinction be made between religious and nonreligious conscientious objectors. *Welsh v. United States* 398 U.S. 333, 356 (1970).

343. *Seeger*, 380 U.S. 163, 187 (1965).

344. *Thomas v. Review Bd.*, 450 U.S. 700, 715-16.

345. See *supra* note 101 and accompanying text.

346. See *supra* text accompanying notes 120-24.

347. 475 U.S. 503 (1986).

348. 476 U.S. 693 (1986).

American Indian from the requirement that applicants for AFDC benefits obtain a Social Security number for their dependent children. Roy, who had applied for benefits, told the court that his religious beliefs led him to the conclusion that issuing a unique number to his daughter would "rob [her] spirit" and prevent her from attaining greater spiritual power.³⁴⁹ When it turned out that a number had already been assigned, Roy asked for (and received from the trial court) an injunction restraining the use or dissemination of the assigned number, and a further injunction requiring continuation of AFDC payments. Writing for eight members of the Court,³⁵⁰ Chief Justice Burger wrote that the free exercise clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."³⁵¹

Writing for himself and Justices Powell and Rehnquist, the Chief Justice maintained that Roy should not be exempted from the requirement of supplying the Social Security number when applying for AFDC benefits. "[D]enial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications."³⁵² Chief Justice Burger attempted to distinguish cases such as *Sherbert* and *Thomas* as involving a kind of discriminatory animus in refusing to grant an exemption.³⁵³ Here, on the other hand, the state had simply used a reasonable means to promote a legitimate and important public interest.

As previously discussed,³⁵⁴ the Court in the *Indian Cemetery* case attempted to align its approval of the Forest Service's development plan within the reasoning of *Bowen v. Roy*:³⁵⁵ no private citizen can expect to dictate the "internal affairs" of the government. However, there is nothing to distinguish the Indians' claim for protection of their burial sites from Mrs. Sherbert's demand for unemployment compensation. In both cases the government was

349. *Id.* at 696.

350. Although he dissented from the holding in *Sherbert*, Justice White apparently felt that until that case was overruled, it could not simply be ignored. *Id.* at 733 (White, J., dissenting).

351. *Id.* at 699.

352. *Id.* at 704.

353. *Id.* at 708.

354. See *supra* text accompanying notes 123-24.

355. 476 U.S. 693 (1986).

asked to change its procedures in order to accommodate the religious claimant's special needs. *Sherbert* was not a case of discrimination, in which state action is constitutional so long as it does not single out religious groups for *worse* treatment than secular groups.³⁵⁶ Rather, the issue is whether the state must change its policies because of the differential impact on religious minorities. *Sherbert* held that it must;³⁵⁷ *Roy* held that it need not.³⁵⁸

D. *Can Theological Reckoning Be Avoided?*³⁵⁹

If weaknesses have been exposed in the reasoning and results found in the Court's "affirmative action" approach to the free exercise cases, it may be thought that neutral, nondiscriminatory criteria could be fashioned to achieve "correct" results without the embarrassing gaffes detailed in the cases discussed. Yet no such criteria have been suggested. In fact, it seems inescapable that an approach designed to take into account the peculiar needs of a religious body will require a court to analyze the theological requirements of an individual and in some way to balance the secular goals of the state against the asserted theological goals of the individual claiming a free exercise right.³⁶⁰ Any decision by a court following such an inquiry is bound to compromise the separation between church and state.

For example, is there any doubt that the Court in *Thomas* cor-

356. South Carolina would deny unemployment benefits to a mother unavailable for work because she was unable to get a babysitter. Thus, we do not have before us a situation where a State provides unemployment compensation generally, and singles out for disqualification only those persons who are unavailable for work on religious grounds.

Sherbert v. Verner 374 U.S. 398, at 416 (1963) (Stewart, J., concurring); *accord, id.* at 419-20 (Harlan, J., dissenting).

357. 374 U.S. 398.

358. 476 U.S. 69.

359. Many of the difficulties with the court's current approach to free exercise are discussed in Marshall, *supra* note 100. That article proposes to subsume free exercise claims within the broader ambit of freedom of expression. This article would follow that approach with the exception of permitting exemptions for religious claimants only, as a matter of legislative grace, where certain conditions apply. *See infra* text accompanying notes 432-56.

360. This point is more or less conceded by many who defend the court's free exercise approach, but it is treated as an inescapable cost of protecting religious liberty. *See, e.g.,* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 343-44 (1969); Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 325-35 (1986); Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149, 171 (1980) (criticism of court's treatment of free exercise clauses nonetheless suggests that "[i]n balancing the competing interests" the factors to be considered must always include "the harm done to religious belief").

rectly limited the coverage of the first amendment to "religious" beliefs? Aside from the textual limitation of the first amendment, how could courts cope with claims of "conscientious objection" to a wide variety of features of the modern regulatory state? If in fact it is the *religious* nature of the belief that is crucial, can the Court avoid inquiry into how the individual's theology incorporates the command or prohibition? Suppose, for example, that a bank employee decides to quit her job because the bank has refused to divest itself of investments in South Africa, or because it loans money to abortion clinics, or because she feels a "calling" to spend more time with her children? If she asks for unemployment compensation,³⁶¹ how should the unemployment benefits board treat the claim (under *Sherbert*) that her action was conscientiously/religiously motivated? As Professor McConnell points out:

Religions recognize degrees of righteousness in various forms of conduct. Not all actions are necessarily required (duties) or forbidden (sins); religion addresses what is "better" as well as what is "good." . . . It may be difficult, however, for an outsider to distinguish religious duties from other religious practices. . . . A person in one religious tradition may feel a religious motivation not a "duty" to engage in a particular action; a person in another tradition might understand the same motivation as a divine calling, the neglect of which would be unfaithful.³⁶²

Identifying whether the claimant falls within one tradition or the other is unavoidable under an "affirmative action" test. The process invites a court to consider how long the particular religion has been in existence, how long the individual claimant has practiced it, and whether the rituals and doctrine of the religion conform to what is usually considered religious. When the Court in *Thomas* referred to claims which are "clearly nonreligious in motivation," how is a court to make such a determination unless it engages in theological inquiry?

Even if a set of beliefs could be readily identified as religious, it seems inescapable that the court must also consider the temporal and other claimed consequences visited upon those who violate the religious command or prohibition. While the distinction between

361. Assuming that the statute providing for unemployment compensation limits coverage to situations where the employee leaves involuntarily.

362. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 27 (1985).

direct and indirect interferences with religious practice seems to have been lost,³⁶³ the decision of whether to grant an exemption seems inevitably influenced by the kind of consequences that would follow from granting or denying the exemption. For example, if only the state's "administrative convenience" is at stake, it will be outweighed by financial loss to the believer.³⁶⁴ If the state's interest in education is at stake, it requires something more substantial, such as evidence that an entire religious culture is at risk.³⁶⁵ If the state's interest is in national defense, not even the imposition of imprisonment for fidelity to one's beliefs will suffice.³⁶⁶ One might fashion a rule which forbids inquiry into the type of consequences that are alleged to flow from the violation of a theological principle, but if that rule requires state accommodation of *any* claimed theological injury, no matter how *de minimis*, claims can be expected to increase geometrically.

On the other hand, one might attempt to make the standard dependent solely upon the nature of the state's interest. Where the state's interest is merely administrative, it must bow; where the state's interest is more weighty, it need not. Such a standard might reduce the amount of theological reckoning, but would produce strange results. For example, the application of this standard presumably would have doomed the claim in *Yoder*,³⁶⁷ but might have supported the claims in *Prince*³⁶⁸ or *Braunfeld*.³⁶⁹ An announced rule that mere administrative convenience will always bow to a free exercise claim, with no inquiry into the merits of the free exercise claim, might open the floodgates to claimants. Additionally, there is considerable difficulty in determining the nature of the state interest at stake. Even a "compelling state interest" test is subject to manipulation, because "[t]he level of generality at which the inter-

363. It would have been possible, before *Sherbert*, to limit the scope of the free exercise claim to those cases where there was a "direct" collision between the religious command and secular duties. See *supra* text accompanying notes 302-11. While such cases would still arise, they would be far less numerous than the number of instances where the state action simply makes the practice of religion more onerous or expensive. *Sherbert* extended constitutional protection to indirect conflicts between religious and secular duties. *Sherbert v. Verner*, 374 U.S. 398 (1963).

364. *Sherbert*, 374 U.S. 398.

365. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

366. *Gillette v. United States*, 401 U.S. 437 (1971).

367. 406 U.S. 205.

368. *Prince v. Massachusetts*, 321 U.S. 158 (1944); see *supra* note 289.

369. *Braunfeld v. Brown*, 366 U.S. 599 (1961); see *supra* text accompanying notes 289-300.

ests are defined often determines the outcome."³⁷⁰

Given the cost to state neutrality of a rule based on the *effects* of state action upon particular religious groups, it is time to explore whether a rule based on neutral *treatment* can be articulated and defended.

VI. THE NONDISCRIMINATION ALTERNATIVE

If in fact the "affirmative action" interpretation of the religion clauses creates unacceptable entanglement in its application, does the nondiscrimination principle promise any relief? An early criticism of Kurland's approach was that the "religion-blind" principle would lead to patently unacceptable results,³⁷¹ and beyond that, did not eliminate the need to define religion.³⁷² To meet these criticisms, it is necessary to demonstrate two things: first, that the *results* produced by the nondiscrimination principle, although occasionally different from those reached by the Court to date, are not inconsistent with our understanding of the purpose of the religion clauses and the fourteenth amendment;³⁷³ and second, that the *method* of resolving these cases will minimize, if not eliminate, the forbidden "entanglement."

As a general proposition, the nondiscrimination principle provides easy solutions to formerly hard cases (*e.g.*, parochial aid and the free exercise cases), but it creates a new set of "hard cases." Unless these "hard cases" are explained successfully, they will

370. Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 341 (citing Frantz, *Is the First Amendment Law—A reply to Professor Mendelson*, 51 CAL. L. REV. 729, 746-49 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962)). As Justice Blackmun noted,

I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces a result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (citation omitted).

371. See Pfeffer, *supra* note 59, at 406.

372. See Mansfield, *supra* note 25, at 216.

373. The need for continuity is a very powerful one, as eloquently expressed by Justice Scalia in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 916 (1989) (Scalia, J., dissenting): "It is not right—it is not constitutionally healthy—that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law."

make the nondiscrimination alternative as unacceptable as affirmative action. To summarize the conclusion reached in this section, most of Kurland's critics ignored an important element in his initial formulation³⁷⁴ of the nondiscrimination principle. Although "government cannot utilize religion as a standard . . . either to confer a benefit or to impose a burden,"³⁷⁵ Kurland cautioned that "the principle offered is meant to provide a starting point for solutions to problems brought before the Court, *not a mechanical answer* to them."³⁷⁶ Most commentators who have considered Kurland's thesis³⁷⁷ have assumed that he intended an absolute prohibition on any classification based on religion. Instead, the presence or absence of classification is a first approximation of neutrality, which begins, but does not end, the determination of whether *in fact* the state action is neutral in its treatment of religion.³⁷⁸

A. *The Easy Cases: Nondiscriminatory, Facially Neutral State Action*

As noted, the Kurland principle would simplify resolution of formerly hard cases. It would virtually end the constitutional³⁷⁹ de-

374. Professor Kurland would undoubtedly prefer to have his principle thought of as simply an articulation of pre-existing conceptions of the religion clauses, rather than a new way of looking at them. While no earlier source can be found for this formulation of the "religion-blind" principle, arguably it was the principle applied in *Reynolds v. United States*, 98 U.S. 145 (1878) and *Bradfield v. Roberts*, 175 U.S. 291 (1899), among other cases. *See supra* note 131.

375. Kurland, *supra* note 13, at 6.

376. *Id.* (emphasis added).

377. *See, e.g.,* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment*, 45 U. CHI. L. REV. 805, 808-809 (1978) (although Kurland's neutrality principle "lends coherence and simplicity to religion-clause doctrine" it does so "only at a cost of almost total emasculation of the free exercise provision"); Pepper, *supra* note 370, at 347 (nondiscrimination principle's "primary weaknesses are an absence of support in the text or history of the clauses and its evisceration of the free exercise clause"); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

378. This does not mean that individual cases will be decided on the "ad hoc" balancing process criticized above; rather, the presence or absence of a religious classification must be analyzed to see whether the state is acting in a content-neutral fashion. For example, even though the school board resolution in *Everson* allocated money to the public high schools and the "Catholic Schools," the state action in that case was in fact neutral because it was based upon a secular category—all schools in the school board's geographical area. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Similarly, provision of chaplains to the military, though arguably based on a religious classification, are in fact neutral because of the more inclusive secular category (needs of soldiers) which the state is otherwise subsidizing.

379. It would not, of course, end the question of whether it is *wise* to aid private schools

bate on most of the troublesome cases involving aid to private schools and claims for special treatment because of religious beliefs. To be more precise, where there is no allegation of discriminatory motive on the part of the state in distributing benefits or burdens, a facially neutral statute, whose purpose is also neutral with respect to religion, could not be challenged simply because it has an effect which "disproportionately" aids or hinders a particular religion. Thus, since the legislative motive for attempting to aid private schools has never been seriously challenged,³⁸⁰ the fact that some religious groups would be "aided" in their religious mission would become irrelevant. Similarly, those who demand a *constitutional* exemption³⁸¹ from laws which were admittedly passed for nondiscriminatory reasons would receive short shrift. So long as the challenged statute or state action was not intended to disable or inhibit any religious group, the neutrality principle is satisfied, and the exemption is properly denied. Thus, the major criticism presented in this article—the necessity of determining the existence, fervency, sincerity, and social worth of religious beliefs—is eliminated. Secular government is expected to direct its efforts toward secular goals, and it need not, and in most cases should not,³⁸² modify its course because of its impact upon religious beliefs. The autonomy of religious institutions and of secular government is thus protected.³⁸³

or to provide exemptions for religious objectors, but that is another matter. For the argument that government funding would compromise the integrity of religious schools, see, e.g., Capps & Esbeck, *The Use of Government Funding and Taxing Power to Regulate Religious Schools*, 14 J.L. & Educ. 553 (1985).

380. See *supra* note 177.

381. Whether the state may *choose* to make exemptions to accommodate religious believers is considered below. See *infra* text accompanying notes 432-56. It is significant that as a matter of constitutional law, an exemption would never be required. If the statute was passed for discriminatory reasons, as discussed *infra* text accompanying notes 406-17, the remedy would be to strike down the statute in its entirety, rather than require exemption from it for religiously motivated objectors.

382. The state may, however, be under an obligation to consider a request for exemption based on religious grounds where it would otherwise grant an exemption for secular reasons. See *infra* note 451 and accompanying text.

383. This attitude may strike the reader as proposing the devaluation of religion and an emasculation of the free exercise clause. However, it is simply an affirmation of the primacy of the neutrality concept. As important as religion may be to individuals and to the culture as a whole, those who favor neutrality suggest that government aids it most when it concentrates on accomplishing secular ends.

B. *The Moderately Difficult Cases*

1. State Action Recognizing Religion but Employing Secular Criteria

It would be unrealistic to think that government could function without ever mentioning religion or a religious institution. A state library may purchase religious books, or sign a lease with a church for a parking lot. A state court may enter a judgment against a church for a slip-and-fall on its sidewalk, or in its favor for enforcement of a construction contract. None of these cases appears to violate the principle of neutrality because the state is not basing its decision on a religious classification, but rather on neutral secular principles. In fact, it was such "neutral principles" that required special rules for the church control cases considered earlier.³⁸⁴

Two recent cases considered by the Court can also be subsumed under this principle. In *Lynch v. Donnelly*³⁸⁵ the Supreme Court ruled on the constitutionality of the City of Pawtucket's ownership and display of a nativity scene as part of its Christmas decorations. In *Edwards v. Aguillard*³⁸⁶ the Court ruled on the constitutionality of a Louisiana statute requiring "equal time" for creation science.³⁸⁷ Each case required careful factual analysis.

The Court noted in *Lynch* that paintings of the Nativity are also hung in the National Gallery³⁸⁸ with no apparent objection; presumably they hang there to promote art, not Christianity. The fact that many viewers may derive religious meaning from the paintings, and that religion is thereby promoted, does not and should not cause the paintings to be excluded.³⁸⁹ Pawtucket made a similar contention about its crèche. The crèche was not chosen to promote religion, but rather as one of a number of symbols that evoke the "Christmas spirit" (something with its origin in religion but by

384. See *infra* text accompanying notes 421-31.

385. 465 U.S. 668 (1984).

386. 482 U.S. 578 (1987).

387. Similar cases confronted by the Court include *Epperson v. Arkansas*, 393 U.S. 97 (1968), in which the Court struck down a state statute that prohibited altogether the teaching of evolution in public schools because of the clear intent to advance religion, and *Stone v. Graham*, 449 U.S. 39 (1980), in which the Court struck down a requirement that the Ten Commandments be posted in each public school classroom.

388. 465 U.S. at 677 n.4.

389. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 881-82 (1984).

now a secular phenomenon distinguishable from it), conducive to retail sales. Whether the decision reflected secular criteria, or was motivated by the desire to advance religion, must be determined by the trier of fact. The fact that religion is thereby advanced or inhibited is not decisive.³⁹⁰

A similar approach, although leading to an opposite conclusion on the merits, was used in *Edwards*.³⁹¹ The Court examined the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, and found that, despite the professed secular reasons for requiring creation science to be taught alongside evolution, the true purpose was "to restructure the science curriculum to conform with a particular religious viewpoint."³⁹² One might easily quarrel with the finding in this case,³⁹³ but the process itself cannot be avoided. Where an individual or group claims that state action departed from neutral treatment because of race, sex, or religion, such state action must be examined to determine whether it was based upon neutral criteria or upon impermissible animus favoring or opposing a protected group.

Suppose, for example, the United States Attorney in Boston hires a disproportionate number of Catholics. Is he discriminating on the basis of religion, or are his choices based on neutral criteria?³⁹⁴ These are difficult factual questions, but because procedures

390. *Lynch* held that Pawtucket's display did not violate the establishment clause. 465 U.S. at 668. The most controversial question in *Lynch*, one not addressed by any of the opinions in the case, is whether it was constitutional to celebrate the Christmas holiday in the first place. The answer is by no means obvious. The state may have independent secular reasons for doing so. See *McGowan v. Maryland*, 366 U.S. 420 (1961); see *supra* text accompanying notes 289-300. But if it is conceded that the state may constitutionally celebrate Christmas in an official capacity, it would be anomalous—indeed, discriminatory—to strip from the holiday any reference to its religious roots. See *infra* text accompanying notes 472-98. The problem of whether and how to celebrate religious holidays is particularly acute in public schools. See *infra* note 493.

391. 482 U.S. 578 (1987).

392. *Id.* at 593.

393. Justice Scalia's dissent, joined by the Chief Justice, was particularly critical of the confusion between individual legislators' *motives* (ranging from the sublime to the ridiculous) and the *legislative intent* of the collective body. *Id.* at 636-38 (Scalia, J., dissenting). The finding of improper motivation should be made sparingly, not only because it strikes at the heart of the democratic process but also because it is unclear how the legislature can subsequently deal with the perceived problem (in this case a bias in the educational process) with "purified" motives. In the employment context the act of discrimination can be identified and remedied, but the legislature's allegedly discriminatory motive would prove much more elusive. See *infra* note 395.

394. More difficult is the hypothetical of a United States Attorney who refuses to hire anyone who will not work on Saturdays. Is this a neutral decision, or one based on prejudice

are already in place in other areas of the law to ferret out discrimination,³⁹⁵ courts can be expected to handle such cases without serious conceptual difficulty. Moreover, *any* theory of the religion clauses³⁹⁶ will be required to provide a similar framework or process.³⁹⁷

Not only is it constitutional to aid religion where such aid comes as an indirect result of the pursuit of some neutral secular policy, but the Supreme Court has also repeatedly held that in some circumstances *not* to do so would be non-neutral and therefore un-

against Sabbatarians? If the nondiscrimination principle suggested in this article is adopted, the issue would be whether secular criteria were used in making the choice, not whether the choice interferes "too much" with a particular individual's exercise of religion. However, the unwillingness of the state to make reasonable accommodations (such as would be made for secular reasons creating the same need for accommodation) may suggest discriminatory animus rather than devotion to secular principles. See *infra* text accompanying note 450 (it is unlawful for a state to deny religious claimants any benefits granted to secular claimants).

395. For example, in sex discrimination cases, the plaintiff must present a *prima facie* case that suggests discrimination; the employer then has the burden to articulate a nondiscriminatory reason for its action, and finally the plaintiff has an opportunity to show that the proffered reason was mere pretext. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).

396. Justice Scalia's dissent in *Edwards v. Aguillard*, 482 U.S. 578 (1987) recommended abandonment of the purpose test. 482 U.S. at 639; see *supra* note 393. Justice Scalia's frustration with the inconsistent use of the purpose test is understandable, but it is hard to believe he would do without it altogether. His position would need to address such cases as *Larson v. Valente*, 456 U.S. 228 (1982), in which "religious gerrymandering" was used against a religious group. See *infra* note 417. Unless one plans to use an effects test to ferret out religious discrimination whose outcomes are even more uncertain a purpose test of some kind is required. Moreover, the purpose test in this sense would be no different from a prohibition against content-based discrimination in the context of a right to free speech. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-5 (1978).

397. Unfortunately, the Court recently abandoned the *Lynch* approach in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). In a fractious set of opinions, a plurality found that public display of a menorah was constitutional, but a crèche was not, because the menorah, unlike the crèche, is not central to its religion. 109 S. Ct. at 3096-97. Rather than examining whether the county's action displayed a discriminatory animus favoring Christianity (a close factual question, given the record), the Court adopted Justice O'Connor's special concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984). See *infra* note 483. Justice O'Connor suggested that the standard should be whether the governmental action "constitutes an endorsement or disapproval of religion," as determined by how it would be perceived by an "objective observer." *Lynch*, 465 U.S. at 690-94.

Although the five-member majority (for certain purposes) in *Allegheny* refused to join Justice Blackmun's opinion in which he specifically relied upon Justice O'Connor's concurrence in *Lynch*, it did rely upon a finding that "[n]o viewer could reasonably think that [the display] occupies [a central location] without the support and approval of the government." 109 S. Ct. at 3104-05. Thus, the Court engaged in a form of analysis referred to in some circles as deconstructionist, in which the message conveyed by a speaker (in this case the state) is in effect severed from what the speaker intended. The Court should have focused instead upon what the state *intended* to communicate, informed, (but not determined) by what various observers *thought* was being communicated.

constitutional. For example, in *Widmar v. Vincent*,³⁹⁸ the Supreme Court considered a state university's denial of facilities for a student group to hold worship services. The Court held that to exclude religious speech from an otherwise open forum would constitute content-based discrimination, and therefore would be unconstitutional.³⁹⁹ Similarly, in any collection of library books or works of art, religious themes would have to be consciously excluded to avoid representation. As Justice Jackson noted in his concurring opinion in *McCollum v. Board of Education*,⁴⁰⁰ "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view."⁴⁰¹ Thus, where some neutral secular category includes religion as one of its constituent elements, the principle of neutrality would require inclusion, not exclusion.⁴⁰²

The law of zoning also illustrates how religion has been taken into account as part of a neutral secular determination.⁴⁰³ Professor Giannella suggested that there is a "secularly relevant religious factor" that should be considered when devising a master zoning

398. 454 U.S. 263 (1981).

399. *Id.* at 267.

400. 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

401. *Id.* In a rare case of overt discrimination against religion, the Tennessee constitution provided that no "[m]inister of the Gospel, or priest of any denomination whatever" could be elected to the state legislature. The Supreme Court found this provision unconstitutional. *McDaniel v. Paty*, 435 U.S. 618 (1978). In a concurring opinion Justice Brennan noted that "the exclusion manifests patent hostility toward, not neutrality respecting, religion." *Id.* at 636 (Brennan, J., concurring). Although Justice Brennan's opinion cited Kurland's neutrality thesis, *id.* at 639, it did so only to comment that such "a unitary principle . . . [has] been tempered by constructions upholding religious classifications where necessary to avoid '[a] manifestation of . . . hostility [toward religion] at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* at 638-39 (quoting *McCollum*, 333 U.S. at 211-12). Professor Marty commented that "[i]t would be pleasant, if unrealistic, to think that *McDaniel* represents a reformation, that its use of a generally neutral concept reflects a 'striving toward doctrinal coherence.'" Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 SUP. CT. REV. 171, 183 (quoting R. MORGAN, *THE SUPREME COURT AND RELIGION* 208 (1972)).

402. Similarly, in making child custody decisions, the state is entitled to take religion into account where the child has a preference and the child's welfare can thereby be promoted; the court can avoid entanglement by determining religious preference as an objective phenomenon rather than by inquiry into the merits of the particular religious beliefs. Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984).

403. For a recent review of cases involving first amendment challenges to zoning regulations, see Pearlman, *Zoning and the Location of Religious Establishments*, 31 CATH. LAW. 314 (1987).

plan.⁴⁰⁴ Many comprehensive plans traditionally have treated churches and synagogues differently from such places as shopping centers or single family dwellings. In fact, this is appropriate because churches and synagogues *are* different from any other classification used in zoning. Nonetheless, so long as the classification is based on secular criteria (the amount of parking required or the traffic and noise patterns associated with it, in short, the "fit" of the building with neighboring uses) neutrality is preserved by "special" criteria for churches.⁴⁰⁵

2. State Action that is Facially Neutral, but Discriminatory

One of Professor Kurland's acknowledged limitations on the neutrality principle is that "actions of the state must be carefully scrutinized to assure that classifications that purport to relate to other matters are not really classifications in terms of religion."⁴⁰⁶ In many ways, this is simply the mirror image of the issue posed in the previous section,⁴⁰⁷ where the analogy was drawn to cases of race or sex discrimination. Statutory discrimination is less likely because it is difficult to single out a religious group in terms that are facially neutral. However, some cases will undoubtedly arise. For example, in *Davis v. Beason*⁴⁰⁸ the Supreme Court affirmed a statute that required voters to deny association with any religion⁴⁰⁹

404. See Giannella, *supra* note 238, at 528-41.

405. *Id.* The case of *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), raised some of these issues, but the Court had difficulty recognizing them. Petitioners challenged the state liquor authority's practice of giving neighboring churches and hospitals a "veto power" over the issuance of a liquor license. The Court held that doing so impermissibly granted secular power to religious authorities. Yet, if the case had been treated essentially as a zoning problem, a more satisfactory result could have been achieved. To be sure, it may be inappropriate for the state to delegate power on such terms to *any* private body, whether religious or not. But if the state were simply taking into account the secular needs of the church (for quiet neighbors) in a way that would have been done for any secular institution (*e.g.*, a hospital) that claimed the same needs, the church's religious identity would not be adding to or subtracting from its secular rights, and therefore the state's action would be neutral.

406. Kurland, *supra* note 13, at 5. The Supreme Court has recognized this possibility. *Gillette v. United States*, 401 U.S. 437, 452 (1971) ("The question of governmental neutrality is not concluded by the observation that § 6(j) [of the Military Selective Service Act of 1967] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses.").

407. See *supra* note 395 and accompanying text.

408. 133 U.S. 333 (1890); see Kurland, *supra* note 13, at 8-11.

409. The statute could have achieved facial neutrality by avoiding the term "religion." For example, the statute could have required voters to certify that they were not associated with any organization that advocated polygamy. This is a good illustration of the ease with

that advocated polygamy. Without naming Mormons, the statute had the effect and the design of discouraging Mormons from voting.⁴¹⁰ Or suppose the Hare Krishna sect argued that a municipal statute forbidding the wearing of orange-colored clothing was designed to discriminate against them, and the city replied that its purpose was to make construction workers more identifiable to promote their safety; what should be the outcome under the neutrality rule?

The proposed standard would treat this case as analogous to the hiring discrimination case. The issue would be whether the statute reflected a discriminatory animus against the religious group in question.⁴¹¹ Although such determinations are not easy, the Court has made difficult determinations in the past.⁴¹² It would be appropriate for a court to consider such factors as how closely related the state action was to its purported purpose; whether the state action preceded or followed the appearance of the alleged discriminatory animus;⁴¹³ and what cost might accrue to the state by foregoing the action.⁴¹⁴ These considerations resemble the factors currently used by the Court in resolving free exercise cases, but they are only tools for determining the presence or absence of a discriminatory animus. The proposal thus places a high burden upon those who challenge facially neutral laws. Moreover, there is no need to consider the extent of the burden upon the religion or its practice, nor the perceptions of some hypothetical "reasonable observer."⁴¹⁵ Since the choice of the trial court would either be to find that the statute is nondiscriminatory, and thereby allow the state action to stand, or to find that it is discriminatory and there-

which discriminatory animus can be disguised by clever draftsmanship.

410. The Court's affirmance was based upon the proposition that the statute was aimed at suppressing the commission of crime, and that advocacy of the commission of crime could be the basis for denying the franchise to vote. It made no clear distinction, however, between the advocacy of the benefits of polygamy or a statement of its divine origin which would presumably be protected speech and the advocacy of present violation of the law prior to its repeal. Although the two are not always easily distinguished, any constitutional ban must attempt it.

411. See *supra* text accompanying notes 289-300.

412. See Eisenberg, *supra* note 12, at 104.

413. As noted above, see *supra* note 269, it might have been decisive in *Reynolds* that laws against polygamy long predated any alleged hostility toward the Mormon religion.

414. These are essentially the same considerations as would be used in the employment discrimination cases. See *supra* note 395.

415. By contrast, the current standard implicitly measures the spiritual damage which would be sustained by the state action. See *supra* text accompanying notes 360-69.

fore void,⁴¹⁶ there would be no need to determine the religious character, sincerity or social worth of the objector's beliefs.⁴¹⁷

C. Hard Cases: The Permissible Use of Religion as a Basis for Classification

The prior categories of cases all fell, after some reformulation, within the principle that neutral secular criteria should be used to grant benefits or impose burdens. In other words, the first approximation of true neutrality is content-neutral rules. However, Justice Scalia has accurately noted that religion clause jurisprudence is to some extent "unavoidably content-based because the Freedom of Religion clause is content-based."⁴¹⁸ Taken to its logical extreme, a fully content-neutral interpretation of the religion clauses would strip them of any independent content, since the press and speech clauses of the first amendment go a long way toward forbidding discrimination based upon the content of the spoken or printed word.⁴¹⁹ Recognition of the special characteristics of religion does not necessarily require the kind of jurisprudence, criticized in sections IV and V of this article, that makes the constitutionality of state action contingent upon the content of various religions. Instead, it is possible to base the special treatment of religion (where appropriate) upon the "secularly relevant"⁴²⁰ characteristics of religion, rather than upon the content of the theology itself. This section considers those cases where religion might be an acceptable classification, so that "mechanical answers" to religion clause controversies do not replace true neutrality. These cases are essen-

416. Once the act is struck down, however, it would be possible to re-enact the statute with exceptions for religious objectors. See *infra* text accompanying notes 432-56.

417. The Supreme Court followed an approach similar to the one proposed here, in *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, the Unification Church attacked an amendment to a Minnesota statute requiring registration of all charitable organizations; the amendment limited a previously universal exemption of religious organizations to only those churches that received more than fifty percent of their contributions from members or affiliated organizations. The court noted that this "is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary, section 309.515, subd. 1(b), makes explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n.23. The court also noted the legislative history of the statute, in which "[o]ne State Senator explained that the fifty percent rule was 'an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . our state.'" *Id.* at 254.

418. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 915 (1989) (Scalia, J., dissenting).

419. *Id.*

420. See *supra* note 404, and accompanying text.

tially of three types: (1) the special treatment for "church control" cases previously considered in section III; (2) the special exemptions from some burden, such as taxes or military service, otherwise imposed on the population at large; and (3) the state's provision of "space" to religion, on a basis not necessarily available to other forms of speech.

1. Special Treatment to Avoid Entanglement

The "church control" and "religious belief" cases, considered in section III,⁴²¹ developed special rules to deal with cases involving religious doctrine or belief. The nondiscrimination version of neutrality would preserve this special treatment. The rationale is twofold. First, for the reasons developed by the courts in the church control cases, government abstention preserves the separate autonomy of church and state. When judges attempt to resolve questions of religious doctrine, religious autonomy is inhibited and government authority is weakened. Second, those who join a church do so with an express or implied consent to the manner in which the church operates. It is appropriate for government to enforce a church procedure, no matter how unfair it might appear, because the members are held to have previously consented to that procedure when they joined the church. Thus, ordinary principles of contract law would dictate that one who consents to be bound by a procedure cannot later challenge the procedure as unfair.⁴²² Although the reviewing court must determine whether the group is religious, therefore requiring judicial abstention, it is because of secular criteria such as the doctrine of consent that the abstention is required.

A related principle applies to cases like *United States v. Ballard*⁴²³ where tort or criminal claims are brought against those whose representations or actions are claimed to be false or tortious. A person who joins a church presumably does so in the hope that the doctrine and practice of the church will improve his lot, either

421. See *supra* text accompanying notes 65-110.

422. The right to organize voluntary religious associations . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent . . . if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 80 U.S. 679, 728-29 (1871); see Comment, *Religious Torts: Applying the Consent Doctrine As Definitional Balancing*, 19 U.C. DAVIS L. REV. 949 (1986).

423. 322 U.S. 78 (1944).

temporally or otherwise. Many believers, as Justice Jackson observed, find themselves bitterly disillusioned by "false prophets."⁴²⁴ But a preacher's assertion that the end of the world is at hand should not be subject to civil or criminal penalties in the event that the millennial hour passes without incident. Again, the principle of consent is appropriately invoked. Presumably, those who are advised of the *spiritual* nature of an actor's enterprise should be on notice of the limitations on the state's ability to enforce promises. Even where earthly benefits are promised as an extension of the spiritual teaching, liability should not follow because religion is a unique beast. Religious "truths" or "promises" are different from a representation that a parcel of land is beachfront property or that the developer will install sewer lines.⁴²⁵ If a preacher promises that faith will bring miracles, and the believer then dies of cancer, does anyone contend that a cause of action will arise for detrimental reliance? Not only is the principle of no-entanglement implicated, but ordinary principles of contract or tort law apply.⁴²⁶

It may be objected that the special treatment of religion granted for purposes of this rule will simply recapitulate the difficulties demonstrated with respect to the court's current approach to the free exercise cases.⁴²⁷ The significant difference is that the religious nature of the enterprise and thereby the qualification for exemption from ordinary principles of fraud should be based upon the *perceptions* of the participants. The court need not determine whether the defendant is in truth a religious figure or a charlatan; it must only determine whether he was *perceived* to be a religious figure by his alleged victims. Thus, Ballard would probably have

424. The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Id. at 94 (Jackson, J., dissenting).

425. See *supra* text accompanying notes 89-90.

426. See *supra* note 422 and accompanying text.

427. See *supra* text accompanying notes 360-69.

succeeded in establishing that he was in fact perceived as a religious figure,⁴²⁸ even if the judge and jury saw him as a swindler, and even though Ballard should later confess that he was insincere.⁴²⁹

As a second qualification, it must be noted that the doctrine of consent for purposes of this rule has the same limitations as it has in other contract or tort cases, namely that it does not extend to practices outside the scope of the consent. A believer may consent to disappointment from the preacher's unprovable and hence unenforceable promise of miracles, but he does not thereby consent to the preacher's embezzlement of his or the church's funds. A believer may consent to the fact that his or her "counseling" with the minister is not to be held to the standard of care of secular counseling,⁴³⁰ but he or she does not thereby consent to sexual abuse.⁴³¹

428. See *supra* note 84.

429. Heins, *supra* note 90, at 191.

Where a patient, consumer, or adherent is fairly on notice that the relief offered addresses the spiritual aspects of physical ills, failure to cure or lack of medical support for the theory of cure advanced should not, even in the absence of statutory exemption, be actionable as breach of contract, fraud, or practicing medicine without a license, no matter how emphatic or hypocritical the assurances of the religious healer.

Id.

430. In *Nally v. Grace Community Church*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987), *rev'd*, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948 (1988), the California appellate court failed to recognize this distinction. The case arose from the suicide of Kenneth Nally, a 24-year-old counselee of defendant church. Nally's parents sued the church under various theories, including the church's failure to refer Kenneth to a secular counselor after he had disclosed his intention to commit suicide. On two occasions the California Court of Appeals reversed the trial court's dismissal of the plaintiffs' complaint. In the second reversal, the court found that a compelling state interest in the prevention of suicide justified a requirement that religious counselors as well as secular counselors place suicidal individuals "in the hands of those best able to prevent these counselees from killing themselves." 194 Cal. App. 3d at ___, 240 Cal. Rptr. at 229. Implicit in the appellate court's standard was the judgment that religious counselors must defer to the superior abilities of secular counselors. The court did not consider the possibility that individuals who seek religious counseling may have decided that religious answers to questions about the meaning of life might be preferable to those provided by the local mental health clinic. The court need not reach the question of whether religious counseling is more likely to inhibit suicide; the question is whether the counselee has expressly or impliedly consented to accept the outcome of religious counseling, for better or worse. If he did so, the courts have no more authority to second-guess that decision than they do to second-guess whether Ballard's followers would have done better investing in a mutual fund.

The case was reversed by the California Supreme Court on nonconstitutional grounds. 47 Cal. 3d at ___, 763 P.2d at 964, 253 Cal. Rptr. at 113 (defendant owed no duty to plaintiff). For an analysis of *Nally* and similar cases, see Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296 (1986) (suggests that free exercise interest of religious group be "balanced" against state's interest in preventing harm to group members).

Determining the scope of the consent will be a difficult factual matter, but it promises fewer intrusions into sensitive first amendment areas, and at the same time it permits courts to reach just results in the majority of cases. In short, the principle of consent, like the principle of nondiscrimination generally, provides a starting point rather than a mechanical answer to particular cases.

2. Exemptions, as a Matter of Legislative Grace, to Promote Secular Ends

A second type of case for special treatment of religion arises where the state chooses to make an exemption solely for religiously motivated objectors. For example, in enacting a military draft, Congress provided that certain persons were exempt from service upon proof that they possessed religious scruples against military service. Does such a provision comport with the nondiscrimination principle? This article suggests that it does. While it is true that the statute uses religion as a classification in distributing benefits and burdens, this should not end the discussion. However, the justification for this exception must be carefully developed.

An implied recognition of the free exercise claim,⁴³² the usual justification for the exception, is of course unavailable under the nondiscrimination principle. The nondiscrimination principle, unlike the affirmative action approach, does not recognize a duty of government to comply with the dictates of private conscience, so long as the government action is not a form of content-based discrimination.⁴³³

431. See the discussion of such cases in Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 87-88 (1986).

432. Justice White discusses this possible justification in his dissenting opinion in *Welsh v. United States*, 398 U.S. 333, 369-70 (1970) (White, J., dissenting).

433. However, there could be cases where the government's failure to accommodate religious concerns on a par with secular concerns betrays a discriminatory animus. See *Menora v. Illinois High School Ass'n*, 683 F.2d 1030 (7th Cir. 1982). In *Menora*, a member of a high school basketball team was forbidden to wear a yarmulke because it was in violation of the association's rules. Judge Posner insisted that each party make efforts to find a common ground for proceeding without the religious conflict. Where a logical solution exists permitting both the state and the religious group to harmonize their goals, the state's failure to implement the compromise may betray religious bias:

[I]f the Association proves to be so obdurate—if it refuses to accommodate the indisputably sincere beliefs of a religious group though it can do so at no cost to the only objective, safety, that the rule in question is claimed to have—it will be standing on constitutional quicksand. Even if the interest in participating in interscholastic basketball is a slight one, a question we need not decide, it would by definition outweigh

However, a different question arises where government *chooses* to exempt persons on the basis of religious belief. As in the area of choosing a religious painting or a religious book, the state's motivation may be critical. One immediate suspicion is that the state's *purpose* is to discriminate on the basis of religion.⁴³⁴ If Congress levied a \$200 tax on every person, but exempted Episcopalians, one would be entitled to worry that Episcopalians in Congress had used the device of exemption to place a discriminatory tax on non-Episcopalians, thus violating the principle of neutrality. But it is obvious that Congress' purpose in exempting religious pacifists was not to confer a benefit upon them; on the contrary, it was to raise an effective fighting force.⁴³⁵ Congress has known from the time of

the burden on the state of accommodating that interest if there were no burden at all. *Id.* at 1034.

434. This article by no means denies the importance of religion to a sound body politic. George Washington's farewell address is frequently quoted on this point:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

Quoted in W. BERNs, supra note 87, at 13. But aware as the Framers were of the importance of religion, they stopped short (at least at the federal level) of direct support of religion conditioned only on its positive secular effects. If that were to become the standard, then, particularly given the sentiments just quoted, no meaningful line could be drawn short of direct support of religious institutions.

The state is not entitled to base its actions upon judgments (positive or negative) of religion's *value* to the state, but rather must act neutrally, i.e., in terms of the secular expressions of religious tastes. The idea of neutrality is that the state should attempt to treat groups and individuals without regard to their religious identity. That does not mean ignoring the existence of religion, but rather preserving a sense of neutrality (agnosticism, if you will) about whether any particular religious belief is true or untrue, beneficial or pernicious. The state can and must recognize that religious beliefs have secular expressions which must be accounted for. Zoning plans must take into account the desire of citizens to attend worship services; selective service systems must include the fact that some citizens are conscientiously opposed to war. Education subsidies must recognize that a substantial amount of higher education, as well as primary and secondary education, takes place at institutions with religious affiliations. To advance its interests, the state may sometimes help, and sometimes hinder, particular religious purposes. This is perfectly consistent with the principle of neutrality.

435. "Exemption was not extended to [conscientious objectors] to further religious belief or practice but to limit military service to those who were prepared to undertake the fight-

the Continental Congress that there are some individuals who will refuse to fight. Thus, Congress made the tactical decision that throwing religious pacifists in jail would sap the war effort to a greater extent than giving them an exemption.⁴³⁶ The question is whether this tactical decision is constitutionally foreclosed by the principle of neutrality. Justice Harlan's concurrence in *Welsh v. United States*,⁴³⁷ argues that "having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."⁴³⁸

If one were to attempt a defense of the exemption on the basis of the superior value to society of religious as opposed to secular beliefs, Justice Harlan's dictum would be dispositive. It would indeed violate the principle of nondiscrimination. Yet, it seems clear that Congress made a distinction based upon the *secular effects* of the beliefs, not their theological merit. Just as Professor Giannella suggested that a "secularly relevant religious factor" could be used in zoning decisions,⁴³⁹ Congress was simply recognizing the secular impact of religious beliefs, and protecting the nation's interests accordingly. Otherwise, Congress would have been forced to choose between two equally unattractive alternatives: either end the exemption for all, and incur costs for increased prison facilities, loss of productive capacity, and ill will toward the government; or open the exemption to anyone "conscientiously opposed" to war, which would lead to even less desirable consequences.⁴⁴⁰ Consider Welsh himself, who based his objection on the ground that "in our failure to recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation."⁴⁴¹ The Armed Services Committee might appreciate the difficulty of explaining to the soldier in the foxhole that Welsh was not beside him because of Welsh's more acute perception of the political, social, and economic realities of the world. If forced to choose be-

ing that the armed services have to do." *Welsh v. United States*, 398 U.S. 333, 369 (White, J., dissenting).

436. Exemptions for religious objectors may serve the state's interest by "preventing the kind of harm caused by the eighteenth amendment [Prohibition]: widespread disobedience; disproportionate investment of enforcement resources; and loss of respect for the law." Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 795-96 (1986) (footnote omitted).

437. 398 U.S. 333 (1970).

438. *Id.* at 356 (Harlan, J., concurring).

439. See *supra* text accompanying note 404.

440. *Gillette v. United States*, 401 U.S. 437, 459-60 (1971).

441. 398 U.S. at 342 (emphasis omitted).

tween exemptions for all and exemptions for religious objectors only, Congress might elect to abolish the exemption altogether.⁴⁴² *Secular* reasons for refusing government orders stand on a different footing from *religious* reasons.⁴⁴³

The case of draft exemptions may be *sui generis* simply because of the unique nature of the need for military service. Since the Constitution is not "a suicide pact,"⁴⁴⁴ and since the draft itself is a unique invasion of personal liberties, perhaps any rule will require allowances and exceptions.⁴⁴⁵ But there are other examples. When Prohibition was adopted in this country, the importation and use of sacramental wine was exempted from the otherwise absolute prohibition of the use of alcohol.⁴⁴⁶ If the legislature could not have used such exemptions, it would be confronted with the unacceptable alternatives of either facing massive opposition to its efforts to control alcohol consumption, or abandoning those efforts altogether. Limiting exemptions to those whose religious beliefs require them to be exempted would seem to further the state's *secular* purposes. Also, suppose a state required vaccinations against certain diseases. It might take into account the fact that some religious groups hold such vaccinations to be sinful. The legislature might decide that the public health interest superseded any private scruples, thus requiring all individuals to be vaccinated. On the other hand, the legislature might conclude that the program's success would be greater if a confrontation with the religious minority groups could be avoided.⁴⁴⁷ As in the draft case, the legislature might find that the secular effect of religious convictions—their failure to deter religious objectors, and their tendency to create martyrs—may require a treatment different from that accorded to nonreligious beliefs (for example, doubts about the effi-

442. Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 282 (1963).

443. If a person says that God forbids him from wearing a tie, we might think he is crazy, but we will experience less personal affront than if he tells us that wearing ties is a symptom of phallic insecurity. Analogously, the Armed Services Committee might find it more palatable to exempt some from service for reasons unrelated to the merits of the war being fought namely, because of a belief that God forbids war of any kind.

444. "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

445. Some of this reasoning affected the opinion in the recent case of *Goldman v. Weinberger*. See *supra* notes 120-22 and accompanying text.

446. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 314.

447. See generally Comment, *An Evaluation of Immunization Regulations in Light of Religious Objections and the Developing Right of Privacy*, 4 U. DAYTON L. REV. 401 (1979).

cacy or advisability of inoculation).⁴⁴⁸

A slightly different problem is posed by statutes designed to prevent religious discrimination. For example, in *TWA v. Hardison*,⁴⁴⁹ the Court considered the constitutionality of an administrative regulation requiring employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business."⁴⁵⁰ The court held that the prevention of religious discrimination is distinguishable from requiring discrimination *in favor* of religious claimants. For example, while it is unlawful for a school board to deny paid leave for religious purposes when it provides paid leave for secular purposes,⁴⁵¹ it is unconstitutional to require the state to single out religious reasons for preferential treatment.⁴⁵² Such regulations do not in fact grant special treatment for religious objectors, but instead require employers to treat their employees equally. Such statutes could be seen as imposing upon private employers an obligation already imposed upon state employers: not to indulge any discriminatory animus against religious beliefs.

One of the advantages of permitting the state to offer exemptions as a matter of legislative grace rather than requiring them as

448. One traditional area of difficulty involves religious sects that disapprove of traditional medical care and instead practice some form of "faith healing." Although adults are generally free to accept or reject medical care, parents who withhold lifesaving medical care from their children may violate laws prohibiting child abuse. Many states have provided limited exemptions for parents whose religious beliefs forbid the use of medical care. See Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith versus Medical Care for Children*, 12 J. LEGIS. 243 (1985). The approach taken by this article would permit such exemptions but not require them; however, there may be other constitutional interests, separate from the religion clauses, that would protect a child's interest in the continuity and supremacy of his parents' custody, so long as there is no imminent life-threatening condition. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 91 (1979).

449. 432 U.S. 63 (1977).

450. *Id.* at 72 (quoting 29 C.F.R. § 1605.1 (1968)). An employee claimed that he had been improperly fired when he refused to work on Friday nights or Saturdays pursuant to his religious beliefs. On appeal the court held that the employer had made a reasonable effort to accommodate the employee and therefore no statutory violation had occurred. *Id.* at 63. For a criticism of the narrowness of the Supreme Court's holding, see Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901 (1977).

451. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986).

452. *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). "This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses" *Id.* at 710.

a free exercise right is that it permits the legislature more flexibility to discover what kinds of exemptions can be practically permitted. Many of the determinations as to whether an exemption can be granted, and if so on what terms, must be a function of careful prudential judgments. As Dean Calabresi has noted, a constitutional ruling cannot be adjusted by legislative or administrative bodies when changed circumstances would otherwise suggest amendments.⁴⁵³

Lest the exemption principle appear to swallow up the general neutrality rule, its limitations should be carefully enumerated. The state should be permitted to grant exemptions for reasons of religious belief only where: (1) its motive in doing so is to advance a legitimate secular interest rather than the interests of the religious group affected;⁴⁵⁴ (2) there is a significant cost imposed upon the state if the legislation were implemented without such an exemption; and (3) the exemption is scrupulously neutral as between religions.

As with the case of exemptions to prevent entanglement, the definition of religion may still be required for purposes of administering exemptions from state laws. The question, however, is a practical one of whether the legislature can administer the exemption without discrimination⁴⁵⁵ or excessive entanglement. Fortunately, under this approach the state has the option of retaining the exemption if it proves workable or abandoning it if it does not. By contrast, creating a *constitutional* right to exemption allows much less flexibility to adapt to changing circumstances.⁴⁵⁶

453. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 11 (1982).

454. This can be demonstrated where the exemption covers only a minority of the population. It is obvious, for example, that where Congress is raising an army but exempts religious pacifists, it is extending an exemption to a group that is politically weak, otherwise Congress would not be raising an army from which exemption is needed. Therefore, it can be concluded that the majority is granting the minority a special concession. Since this presumably works to the benefit of both majority and minority, it is hard to understand wherein the constitutional harm lies.

455. See *supra* text accompanying notes 320-36.

456. Finally, there is the question of a nonreligious claimant's standing to challenge exemptions asserted by religious claimants. A legitimate question can be raised as to whether, in the absence of religious claimants, the state would grant an exemption to any objectors. If, as Justice White noted in *Welsh*, the treatment of the nonreligious objector would be the same either with or without the exemption for religious objectors, there may be no injury, and hence no standing:

Even if *Welsh* is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military

A unique category for exemptions arises in the area of taxation. The first case to challenge tax exemptions granted to religious organizations was *Walz v. Tax Commission*.⁴⁵⁷ However, the statute attacked in *Walz* did not limit its exemption to religious institutions, but rather extended the exemption to charitable institutions irrespective of religious ties.⁴⁵⁸ In *Texas Monthly, Inc. v. Bullock*⁴⁵⁹ the Court considered a challenge to a Texas statute that exempted only religious periodicals from state sales tax.⁴⁶⁰ A plurality found that the statute lacked both a secular purpose and a neutral effect, because "Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief,"⁴⁶¹

The plurality in *Texas Monthly* failed to consider the otherwise broad discretion given to taxing authorities to devise a scheme of taxation that fairly distributes the burden of raising revenues.⁴⁶² Just as a zoning scheme may provide for different treatment of churches than for shopping centers, libraries, or museums, a taxing authority may legitimately view the sale of Bibles and religious tracts as presenting a significantly different vehicle of taxation when compared with the petitioner, *Texas Monthly*. Such factors as the amount of revenue raised compared to the headache of tax collection, the relative ability of the taxpayer to pay, and the risk of entanglement between church and state,⁴⁶³ might militate in

duty. . . .

[F]or as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if § 6(j) would present no First Amendment problems if it had included Welsh and others like him. *Welsh v. United States*, 398 U.S. 333, 368 (1970) (White, J., dissenting). This conclusion depends upon the assumption that Congress' motive in choosing not to exempt nonreligious pacifists was not based upon a discriminatory animus. That assumption appears to be correct.

457. 397 U.S. 664 (1970), see *supra* text accompanying notes 111-13.

458. 397 U.S. at 672-73.

459. 109 S. Ct. 890 (1989).

460. *Id.* at 892. The statute exempts "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith. . ." TEX. TAX CODE ANN. § 151.312 (Vernon 1982) (amended 1989).

461. 109 S. Ct. at 901.

462. The plurality also failed to honor the distinction advanced in *Walz* between direct subsidies and "simply abstain[ing] from demanding that the church support the state." *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970).

463. Consider the practical dimensions of collecting taxes for religious publications. Many

favor of an exemption for religious groups that would not be available to nonreligious groups, *leaving aside the theological merit of the activity*. In other words, it is perfectly plausible that the State of Texas chose to exempt religious groups from taxation for reasons having nothing to do with an "endorsement" of religion. Since no tax code has yet been characterized as a seamless web of perfectly consistent principles, it is inevitable that some similarly situated taxpayers will have significantly different tax liabilities. Just as the different traffic, noise, and use patterns of a church demand treatment distinct from any other category of landowner, the particular revenue patterns of churches may suggest that unique taxation patterns may also be appropriate.

The plurality in *Texas Monthly* also suggested that striking down the statute furthered the interest of neutrality by avoiding an examination into "whether some message or activity [of the taxpayer] [was] consistent with 'the teaching of the faith.'"⁴⁶⁴ While the thesis of this article has been the desirability of avoiding such inquiries, taxing authorities are inevitably confronted with claims for exemption on a variety of issues that may be insincere or fraudulent. The line drawn by the statute clearly differentiates the Bible and the *Texas Monthly*. The degree of entanglement caused by the statute is clearly dwarfed by the potential for entanglement caused by routine tax collection from parish halls and tract publishers.⁴⁶⁵

In summary, exemptions granted on the basis of legislative grace frequently serve *secular* ends. When they do, the state should be able to further its own legitimate secular purposes, even where an incidental benefit to religion is conferred as a result.

publications are given away free, but with a suggested "donation" to cover printing costs. Are such transactions "sales" for purposes of sales tax? In what amount? Again, the unique characteristic of the distribution of religious publications defy traditional taxation categories, unlike the sale on a newsstand of the *Texas Monthly*.

464. 109 S. Ct. at 902 (citations omitted).

465. In *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S. Ct. 688 (1990), the Court rejected the argument that imposing state sales and/or use taxes on religious publications would violate the free exercise clause. Although consistent with the neutrality principle, the case illustrates two principles stressed in this article: (1) it is artificial to separate the analysis of a case into two separate components, alternately considering free exercise and establishment clause concerns; and (2) the Court should provide a wider channel between Scylla and Charybdis to allow states to determine whether an exemption for religious purposes is workable and/or desirable. Instead of asking whether the state had struck the perfect balance between establishment clause and free exercise clause concerns, the Court should have limited its inquiry to whether the state had acted neutrally, that is, without a discriminatory animus, in formulating and applying its tax policy.

3. Providing "Space" to Religion

The most controversial category of cases includes what might appear to be direct support of religion. The military's provision of chaplains is the paradigmatic example. Additional cases include a state's employment of a legislative chaplain or an invocation at a high school graduation ceremony. A religious painting or a religious book can be purchased and displayed because of artistic or literary merit rather than religious content,⁴⁶⁶ in effect subsuming the religious aspect of the item in question within larger secular principles. But there may be cases where assistance is given to religion with a conscious recognition of its religious nature. Can such a practice ever be found consistent with the neutrality principle?

The short answer is "yes." Although one can say that a library purchases books about religion because they are books and not because they are about religion, eventually it must be recognized that some books are chosen precisely because they are about religion. That is, when a librarian selects the range of books to fill the shelves of a library, he or she looks to the vast range of appetites for books. Public libraries contain mystery novels, car repair manuals, children's stories, atlases, stock market reports, phonograph records, cookbooks, political manifestoes, photography collections, literary classics, and so forth. It would comprise a strange collection if there was no attempt to satisfy the library patrons' appetite for religion (not just the scholarly study of religion, but the desire for inspiration, even salvation). Just as a patron checks out a mystery novel to entertain himself (not to engage in a scholarly study of the mystery novel), it would not be surprising to find that some patrons check out religious books in order to promote their faith. The fact that every public library subsidizes this endeavor should not be shocking. Nor would it be an appropriate subject of constitutional challenge. Indeed, a librarian who, in recognition of this phenomenon, excluded books about religion or limited their use to "nonreligious purposes" would be guilty of religious discrimination, even if the purpose was to avoid offending the establishment clause.⁴⁶⁷

Similarly, it can be demonstrated that when the military provides soldiers with what is in essence a total environment, what

466. See *supra* text accompanying notes 385-405.

467. See the discussion of *Widmar v. Vincent*, 454 U.S. 263 (1981), *supra* text accompanying notes 398-401.

one commentator has called a "pervasive governmental presence,"⁴⁶⁸ it would be anomalous to provide eating and sleeping quarters, recreation, education, sanitation, and health facilities, but no place for religious exercise. Thus, the fact that the military pays for the chaplains or rabbis is no more surprising than the fact that it pays for cooks or surgeons. This is not to say that there will not be conflicts and difficulties in determining how many chaplains, and of what denominations, will be supplied to a given group of soldiers,⁴⁶⁹ but the general concept that the military supplies religious needs because religion is part of the "total world" the military undertakes to supply should require little more justification than the expenditure of public library funds for religious books. Indeed, in both cases the deliberate exclusion of religious categories from state funding would be distinctly non-neutral.

In a technical sense, religion has become a classification by which state funds have been awarded; the chaplain's salary will be a distinct line item in the budget, just as religion is a classification within the Dewey Decimal System in the library. Some form of classification is unavoidable, and therefore the choice must be made as to whether inclusion is more or less neutral than exclusion. Based on the above analysis, inclusion is certainly the more neutral path in terms of substantive fairness. Moreover, the selection of chaplains or library books poses far less danger of entanglement than the determination of "sectarianness"⁴⁷⁰ or the degree of theological injury;⁴⁷¹ here again, as with the special rules to avoid entanglement, the state can take expressions of belief at face value rather than being forced to analyze and evaluate them. The librarian can purchase books on the basis of patron requests, and chaplains can be assigned based on the expressed religious preferences

468. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 161 (1986).

469. It is conceivable that the military could supply space, but no more, leaving the selection, retention and pay of its chaplains to private groups. As one commentator has pointed out, depriving the military of the ability to coordinate the chaplaincy would entail serious logistical difficulties. Herrmann, *Some Considerations on the Constitutionality of the United States Military Chaplaincy*, 14 AM. U.L. REV. 24, 36 (1964); see also Giannella, *supra* note 238, at 525. Even a recent criticism of the military chaplaincy program recognizes that the military should pay for chaplains; the only complaint is that the current system "impermissibly subordinate[s] religious interests to military concerns." Kaplan, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210, 1218 (1986).

470. See *supra* notes 125-262 and accompanying text.

471. See *supra* notes 263-370 and accompanying text.

of soldiers. By contrast, a decision to exclude all religious books or to forbid subsidies for chaplains would require extensive evaluation of which books are in fact religious and which forms of accommodation within the military constitute a "subsidy."

a. Extensions of the Principle to Schools

Virtually all commentators, even those who advocate "strict separation" or "strict neutrality," have conceded that military chaplains are indeed constitutional.⁴⁷² Although most have rationalized this obvious subsidy to religion as a requirement of the free exercise clause, the practice itself is not perceived as a violation of state neutrality toward religion. If the justification offered here is valid, the question naturally arises as to whether it can be extended to other settings that are analogous to the "total world" created by the military. Some commentators have suggested that public schools also contain aspects of the "pervasive governmental presence;"⁴⁷³ schools take away freedom of action from students who are required by law to be there. While the governmental presence is not nearly as intrusive as that of a military base or a prison, it cannot be said that the operative principle disappears altogether. Moreover, aside from the fact that compulsory education has an intrusive and displacing effect upon the lives of school-age children somewhat analogous to the military, there is the additional analogy to the public library. Schools purport to provide an introduction into all phases of adult life, including physical education, literature, science, the arts, home economics and shop. There ought to be a place in this collection for religion. "[I]t is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind."⁴⁷⁴ It is no secret that, at least until quite recently, schools have neglected this task.⁴⁷⁵

However, it is not entirely clear what sort of place religion ought to have. Justice Jackson agreed with the majority in *McCullum v. Board of Education* that it was improper for schools to permit private religious groups to conduct religious instruction on school property during school hours, but he expressed doubt that a mat-

472. See, e.g., L. PFEFFER, RELIGION, STATE AND THE BURGER COURT 158-59 (1984).

473. McConnell, *supra* note 468, at 162-63.

474. *McCullum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

475. See the studies cited in McConnell, *supra* note 468, at 162 n.70.

ter of such subtlety could be resolved by the court's becoming "a super board of education for every school district in the nation."⁴⁷⁶ Nonetheless, general principles ought to be stated to provide school boards with reasonably detailed guidance about the constitutionality of particular practices. The major practices at issues are: (a) space for student religious groups to meet during "student activity" periods; (b) space for religious instruction as part of the school curriculum; and (c) space for prayer.

b. Space for Student Religious Groups

The case of *Widmar v. Vincent*⁴⁷⁷ established that university student religious groups were entitled to the same facilities afforded other student groups. The issue was then raised as to whether the same principle should be extended to high school groups. In *Bender v. Williamsport Area School District*,⁴⁷⁸ the Court declined to reach the merits⁴⁷⁹ of a case in which a high school religious group, Petros, had been refused the right to meet on campus as a club. However, the case was widely discussed, and along with other similar cases, prompted Congress to enact the Equal Access Act.⁴⁸⁰ The major objections to an extension of *Widmar* to high school students have been based upon the argument that, whereas college students would perceive the use of an "open forum" by a religious group as an act of neutrality, high school students would perceive the use of school classrooms as an act of endorsement of religion by the school.⁴⁸¹ This argument is no stronger than the converse, which is that the school's refusal to provide space would similarly appear as an act of hostility.⁴⁸² In

476. *McCollum*, 333 U.S. at 237 (Jackson, J., concurring).

477. 454 U.S. 263 (1981).

478. 475 U.S. 534 (1986).

479. The district court had ruled in favor of the students; the school district did not appeal, but one member of the school board filed an appeal with the Court of Appeals for the Third Circuit. *Id.* at 539. The Third Circuit held that the practice of permitting prayer clubs to meet on school premises violated the establishment clause, and reversed. *Id.* at 540. The Supreme Court held that the school board member lacked standing to appeal the decision, and therefore vacated the Third Circuit's opinion. *Id.* at 549.

480. 20 U.S.C. § 4071-4074 (Supp. 1985). For a discussion of the Equal Access Act see Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986).

481. Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529, 572-73 (1985).

482. Laycock, *supra* note 480, at 19; Strossen, *A Constitutional Analysis of the Equal*

any event, according constitutional rights on the basis of largely unprovable perceptions is a dangerous business.⁴⁸³ Where the school is excluding a religious group on the basis of content, as opposed to time, place and manner, first amendment values are plainly jeopardized, as *Widmar* established.⁴⁸⁴ Particular cases will obviously raise issues of time, place, and manner, as well as claims of discrimination either in favor of, or against, religion. But no generalized prohibition appears defensible.⁴⁸⁵

c. Space for Religious Instruction

The second area of concern is when the school itself undertakes to teach religion. The Supreme Court addressed this issue as early as 1948. In *McCollum v. Board of Education*⁴⁸⁶ and *Zorach v. Clauson*,⁴⁸⁷ the Supreme Court considered so-called "released time" programs that had been initiated in many schools. In *McCollum*, the schools initiated a program where once a week students were assigned, based on parental choice, to one of four groups: Protestant, Catholic, Jewish or "Other." Each of the first three groups went to a classroom where a teacher supplied by that group provided thirty to forty-five minutes of religious instruction. Students in the "Other" group were required to remain at school

Access Act's Standards Governing Public School Student Religious Meetings, 24 HARV. J. ON LEGIS. 117, 146 (1987).

483. Justice O'Connor suggested in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that the test of governmental purpose should be "whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691 (O'Connor, J., concurring); see *supra* text accompanying notes 385-401. Justice O'Connor's approach, and the following it has generated, is carefully analyzed and rejected. Smith, *supra* note 25. One of the central problems is in the lack of an objective standard for "whose perceptions count." *Id.* at 291; see also McConnell, *supra* note 322, at 48 ("objective observer" standard "serves merely to avoid stating what considerations inform the judgment that a statute is constitutional or unconstitutional"). Unfortunately the "objective observer" test was relied upon at least in part in the *Allegheny County* case. *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3104-05 (1989); see *supra* note 397. For a more sanguine view of the O'Connor approach, see Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986); Marshall, *supra* note 17, at 550 ("Establishment exists when a governmental action symbolizes improper state endorsement of religion").

484. See Mawdsley, *Prohibition of Student Religious Activities on Public School Premises: Unreasonable Content-Based Restriction*, 4 COOLEY L. REV. 117, 156 (1986).

485. One commentator's analysis of *Bender* and the Equal Access Act concludes that schools must engage in a case-by-case analysis of equal access claims by student groups. See Strossen, *supra* note 482.

486. 333 U.S. 203 (1948).

487. 343 U.S. 306 (1952).

engaged in some other form of study. The Court struck down this program as a "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."⁴⁸⁸ In addition, the Court cited the use of "the State's compulsory public school machinery" to encourage student attendance.⁴⁸⁹

In *Zorach* the school district released children from school on written request of the parents to enable attendance at religious instruction or devotional exercises off campus. As in *McCullum*, students who were not released were required to remain at school, although classes were not conducted during that time. A majority of the Court found the program in *Zorach* constitutional, on the ground that it was indistinguishable from a case where individual students requested a release from school for religious training. However, Justice Jackson in his dissent complained that the school then "serves as a temporary jail for a pupil who will not go to Church."⁴⁹⁰

Virtually every commentator has declared these cases irreconcilable.⁴⁹¹ Justice Jackson's concurring opinion in *McCullum*,⁴⁹² points out a troubling fact: if in fact the schools are permitted, perhaps even obligated, to teach about religion, can we reasonably expect public school teachers to handle the task? "[H]ow one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know."⁴⁹³ The risk, of course, is that schools will simply ignore the potentially controversial subject of religion altogether.⁴⁹⁴ Recent research suggests that this has

488. 333 U.S. at 210.

489. *Id.* at 209-10.

490. 343 U.S. at 324 (Jackson, J., dissenting).

491. See, e.g., Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."* 1962 SUP. CT. REV. 1, 32; Laycock, *supra* note 480, at 33; Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202, 1233 (1974) ("more than twenty years of repeated discussion of *McCullum* and *Zorach* by Justices of the Supreme Court have failed to elucidate the distinction between them").

492. See *supra* note 401 and accompanying text.

493. 333 U.S. at 236. Any reader confident of the schools' ability to teach neutrally on the subject of religion should consider the cases litigating the constitutionality of Christmas programs. See Smith & Hayes, *A Christmas Carol Revisited: Humbug in the Sioux Falls Schools*, 24 ST. LOUIS U.L.J. 359 (1980); Pevar, *Public Schools Must Stop Having Christmas Assemblies*, 24 ST. LOUIS U.L.J. 327 (1980); Note, *Religious-Holiday Observances in the Public Schools*, 48 N.Y.U. L. REV. 1116 (1973).

494. Indeed, some have suggested that it is impossible to read or study the Bible without

in fact occurred.⁴⁹⁵ Rather than attempt the herculean task of designing a curriculum that treats each aspect of religion with scrupulous neutrality,⁴⁹⁶ a school board might permit parents to designate from among several alternatives a curriculum concerning religion that is in harmony with those parents' beliefs. This approach might be particularly appropriate for such topics as AIDS education and other "value" issues where schools are expected to provide instruction but suffer from a lack of consensus on how best to teach the subject.⁴⁹⁷ If parents are free to choose a viewpoint that complements their own, the school may be able to fulfill its obligations to teach controversial subjects without being forced to take a position on sensitive issues. Although such programs would appear to conflict with *McColum*,⁴⁹⁸ the primary vice in that case,⁴⁹⁹ creating a "jail" for uncooperative students, could easily be

its becoming an act of devotion. L. PFEFFER, *CHURCH STATE AND FREEDOM* 448 (rev. ed. 1967). See generally Comment, *supra* note 43.

495. See *supra* note 475.

496. For example, to avoid preferring either Catholicism or Protestantism, a public school discussion of the Reformation would stress the political, social and economic bases of the movement, deemphasizing the doctrinal religious controversy; and to the extent that the theological dispute were considered it would be treated in an even-handed, neutral manner, as a subject upon which reasonable men may reasonably differ. This secular treatment unavoidably tends to belittle both Protestant and Catholic dogma and hence may perhaps be characterized as indoctrinating antireligionism or secular religionism.

Schwarz, *supra* note 377, at 700.

497. At one time the National Education Association recognized that in the area of sex education "[f]athers and mothers are the best judge of how much information to give their own children." In addition, it advised that "[m]any questions that children ask about sex can be answered constructively in a religious framework. Some fathers and mothers preface all explanations with the statement that God made it possible for mothers and fathers to have babies." Quoted in Farris, *NEA's Push for Sex Education Builds Home-School Sentiment*, *Spokesman-Review*, Oct. 16, 1988, at A17, col. 3. If the most effective AIDS education is that given in a religious context (whatever the religious preferences of the parents, including a preference for no religion), and if the schools have difficulty providing the religious context directly, then a *McColum*-type program, administered under the guidelines suggested, might most effectively accomplish the state's secular purposes without violating the neutrality principle.

498. 433 U.S. 203.

499. The other vice cited in *McColum*, that the programs advanced religion, would be cured by requiring the programs to teach a subject that is otherwise legitimately incorporated into the curriculum. There is nothing unconstitutional about requiring every student to learn about sex, or evolution, or religion, for that matter. *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment"); see also Note, *Teaching the Theories of Evolution and Scientific Creationism in the Public Schools: The First Amendment Religion Clauses and Permissible Relief*, 15 U. MICH. J.L. REF. 421, 459 (1982) (arguing creation should be presented, not as a scientifically valid alternative, but as one of

avoided by requiring that one such class be available to every student. Parents dissatisfied with the range of ideological choices would be invited to offer their own.

d. Space for Prayer

The most controversial religion clause cases have been those that prohibited organized prayer in public schools. If the military can supply chaplains, can the public schools provide space for prayer at the beginning of the school day? Even those who see the analogy to the military agree that there are important differences.⁵⁰⁰ However, the generic problem remains the same: balancing competing needs, religious and secular, in a neutral fashion. Some have sug-

many creation stories of the world's religions).

Although it has been suggested (see, e.g., Vieira, *School Prayer and the Principle of Uncoerced Listening*, 14 HASTINGS CONST. L.Q. 763 (1987)) that parents have a right to protect their children from any teaching that they find objectionable, this argument is a function of the incoherent "balancing" test described *supra* in section V. Ultimately the state must be ceded the authority to require *all* children to master certain skills and to be exposed to certain facts. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988); see Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1661 (1986) (absent clear free exercise claim it is "unlikely that parents can exempt their children from certain courses to which they may object").

Tolerance of alternate *methods* of providing the core of state citizenship (e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), should not be confused with a parent's purported right to protect the child from exposure to any and all ideas that the parents find objectionable. See *supra* text accompanying note 150. States may of course *choose* to permit parents to remove their children from various courses to which the parents object, but under the analysis presented in this article, no such exemption procedure is *required*. For a contrary view, see Leedes, *Court-Ordered Exemptions to Secure Religious Liberty*, 21 U. RICH. L. REV. 335 (1987); Note, *The Constitutionality Under the Religion Clauses of the First Amendment of Compulsory Sex Education in Public Schools*, 68 MICH. L. REV. 1050 (1970).

The school has no authority to teach which world views are good or bad, but it does have the right to insist that all of its citizens know facts that it believes are important to good citizenship, including the causes of AIDS, the birthdate and basic philosophy of important figures in world religion, and theories about the origin of life on earth. It can hardly be contended that such instruction should wait until students are "mature" enough to handle religious differences with ease. It is also unrealistic to think that there are completely "neutral" ways to handle such subjects as AIDS, evolution, and transubstantiation. If a third grader is required to listen to a presentation of the AIDS crisis (or the origin of species or the Reformation) that directly conflicts with what he learns at home, the educational process and the child are likely to suffer. Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 908 (1977). The suggested approach allowing the school to customize the curriculum to harmonize with parental values makes it possible for students to learn potentially discomfiting facts, or to hear about conflicting world views, in a context that promotes the educational process as a whole.

500. See, e.g., McConnell, *supra* note 468, at 160-63.

gested that, since schools are secular institutions, they are justified in excluding religion.⁵⁰¹ Yet, there may be circumstances in which exclusion is discriminatory.

e. The Privatization of Prayer

One suggested solution to the problem of competing religious tastes has been a "moment of silence," giving students an opportunity to pray or meditate. In *Wallace v. Jaffree*⁵⁰² the Supreme Court considered an Alabama statute that provided for a one-minute period of silence "for meditation," and an amendment that provided the same period "for meditation or voluntary prayer."⁵⁰³ The Supreme Court struck down the amendment, but not the underlying statute. The ruling was ultimately based on the fact that the district court had found no secular purpose to the amendment. The case unfortunately suffered a strange procedural history,⁵⁰⁴ and although the Court did not proscribe moment-of-silence statutes, it warned that it would find them unconstitutional if they went so far as to "expre[ss] the State's endorsement of prayer activities for one minute at the beginning of each schoolday [sic]."⁵⁰⁵ The Court did not make clear, however, whether it is permissible for the state to recognize the existence of religious needs as the military does when it supplies chaplains and then to attempt to accommodate them. Part of the difficulty lies in the symbolic nature of the state's action, and the court's adoption of Justice

501. *Id.*; see also Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 182 (1986) (rejecting the views in Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 N.W. U. L. REV. 1 (1986)).

502. 472 U.S. 38 (1985).

503. ALA. CODE § 16-1-20 (Repl. Vol. 1987).

504. The parent of three children in the Alabama public schools sued to enjoin the operation of the two statutes noted above, plus an additional amendment passed in 1982 that authorized public school teachers to lead "willing students" in a voluntary prayer. 472 U.S. at 40 n.3. After conducting an evidentiary hearing regarding the statute's legislative intent, the district court granted a preliminary injunction based on the lack of a clearly secular purpose. *Id.* at 41. Four months later, after a trial on the merits, the district court dissolved the injunction, after concluding that "the establishment clause . . . does not prohibit the state from establishing a religion." *Id.* at 45. As the Supreme Court noted with admirable restraint, the Eleventh Circuit "not surprisingly" reversed. *Id.* at 46. The plaintiff had abandoned his claim that the original statute was unconstitutional, and by an earlier order the Supreme Court had affirmed the Eleventh Circuit's ruling that the 1982 statute was unconstitutional. Thus, the only remaining issue was whether the amendment to add "or voluntary prayer" was constitutional. *Id.* at 46-48.

505. 472 U.S. at 60.

O'Connor's suggestion in *Lynch*⁵⁰⁶ that perceptions of endorsement are an index of constitutionality *vel non*.⁵⁰⁷ At some point the politicization of the issue creates a "message" that the legislature never intended.⁵⁰⁸

In *Engel v. Vitale*⁵⁰⁹ and *Abington Township v. Schempp*,⁵¹⁰ the Supreme Court expressed concern that in the public school context peer pressure makes it difficult for children to enjoy true religious liberty, even where formal compulsion is lacking.⁵¹¹ These concerns are attenuated but not eliminated by converting an opening prayer into a "moment of silence." Where the state is forbidden from supplying content to this exercise, the effect of peer pressure will become even stronger.⁵¹² One would hope that the Court would acknowledge the legitimacy of the schools' efforts to accommodate the religious needs of school children, but one would also hope that administrators would have something more to offer than a moment of silence. Where space for an optional religious exercise is provided, and children are truly free to attend or not,⁵¹³ the concerns of *Engel* and *Schempp* are virtually eliminated, and religious needs more fully accommodated than through a compulsory moment of

506. 465 U.S. 668 (1984).

507. See *supra* note 483.

508. In its zeal to prevent even the least suggestion that religion might be a preferred form of activity during the moment of silence, the Court curiously ignored its prior cases where it recognized the state's right, even a duty, to make special accommodations for the fulfillment of religious duties. Note, *A Moment of Silence: A Permissible Accommodation Protecting the Capacity to Form Religious Belief*, 61 IND. L.J. 429 (1986).

509. 370 U.S. 421 (1962); see *supra* text accompanying note 211.

510. 374 U.S. 203 (1963); see *supra* text accompanying notes 211-13. *Schempp* involved devotional Bible reading, rather than prayer, but the issue is essentially the same: does any type of religious exercise have an appropriate place in public schools or functions?

511. Wallace, 472 U.S. at 60 n.51.

512. One commentator suggested solving this problem by prefacing the moment of silence with a statement concerning religious freedom. Laycock, *supra* note 480, at 65.

513. However, religious differences cannot be concealed altogether, and some "peer pressure" is unavoidable. The fact that a high school quarterback or a school cheerleader belongs to a religious club may incline other students to join (or not to join, for that matter), but such subtle influences cannot doom an otherwise constitutional program. It is another matter, however, if a second grader is banished from his classroom because his religion does not permit attendance at some activity. This was an important reason for the court's disallowance of school prayer in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). Even though some students might benefit, the practice of compulsory school prayer required small children to make painful choices about whether to remain true to their (parents') religious convictions or to "go along" with their classmates. See Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 836-38 (1983). For a semi-satirical view of the problem, see the Art Buchwald column quoted in Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need A Constitutional Amendment*, 61 N.C.L. REV. 141 n.2 (1982).

silence.⁵¹⁴ In the current climate, the moment of silence is more neutered than neutral.

Of course there will be situations such as a high school graduation, where it is not feasible to provide facilities for a separate service or to offer a variety of different experiences to suit all religious tastes. Only one invocation or benediction is usually practical in such settings. The choice must then be made as to whether to include some form of generic prayer that attempts to satisfy the religious needs of the vast majority of those who want to pray. Some have argued that under no circumstances should government involve itself with such matters.⁵¹⁵ The question is not without difficulty. However, it must also be recognized that the failure to provide a prayer under such circumstances may deprive many students and parents of an important experience. For many, graduation will be incomplete unless accompanied by an invocation of divine blessing.⁵¹⁶ Although some have tried to rescue such practices by characterizing prayers under these circumstances as "ceremonial occasions that bear no resemblance to obviously religious exercises,"⁵¹⁷ it should not be necessary to sustain the constitutionality of such exercises only by denying that they have any significant religious content.⁵¹⁸ In fact, it is precisely because many par-

514. See *supra* notes 478-79, for a discussion of *Bender*.

515. In *Engel*, the state of New York had devised the "Regent's Prayer," designed for use by its public schools. It read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy Blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422. The Supreme Court struck it down, holding that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425. However, this generalization is subject to challenge. If chaplains for the military are permissible, they may well develop a "book of common prayer" that is transferred from unit to unit. As noted above, there are difficulties associated with satisfying the wide variety of religious tastes. See *supra* text accompanying note 469. Standing to complain lies with any person who feels that government has not acted neutrally in its choices. The fact that government becomes involved in selecting which chaplains, of what denominations, will be provided on what occasions, or what prayers will be used, does not by itself offend the neutrality principle. See also *infra* text accompanying note 520, for a discussion of *Marsh v. Chambers*, 463 U.S. 783 (1983).

516. DuPuy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?* 35 *DRAKE L. REV.* 323, 364 (1985-86) ("In seeking to retain the meaningful time-honored religious elements of graduation, today's students may be merely asking that this consummate moment in their educational experience not be rendered, by judicial fiat, eccentric and incomplete").

517. Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 *N.Y.U. L. REV.* 364, 379 (1983).

518. Note, *Invoking the Presence of God at Public High School Graduation Ceremonies: Graham v. Central Community School District*, 71 *IOWA L. REV.* 1247, 1266 (1986).

ents and students want to connect the graduation ceremony with their religious beliefs that an invocation and/or benediction are sought.

On a more mundane level, a football player who is about to be subjected to high physical and emotional stress may want the opportunity to engage in collective prayer with his teammates.⁵¹⁹ Careful factual analysis is required in order to balance the religious convictions of all relevant parties and to provide continued assurance that religion is being treated neutrally. Presumably, those who think that religion is mere mumbo-jumbo are not significantly harmed by having to wait while others discharge their ritualistic duties. On the other hand, a child with his own religious scruples about how prayer is to be conducted might experience significant harm by feeling compelled to absent himself until the exercise is over. Thus, while daily prayers in a primary school cannot be justified as a neutral accommodation, an invocation at high school football games might, depending upon the facts, be acceptable. While sensitivity is required, the mere possibility that such harm might occur should not doom all religious exercise as a matter of abstract principle. Careful weighing by the state officials charged with decision making authority should suffice to balance the needs of differing religious and nonreligious perspectives. Ultimately, the standard should be the same as suggested earlier with reference to the crèche cases: has the state acted neutrally, or does its conduct betray discriminatory animus?

4. Odd Cases: Historically Sanctioned Practices

In addition to the hard cases cited above, there is a group of cases that are difficult to resolve except by reference to their historical pedigree. For example, in *Marsh v. Chambers*⁵²⁰ a Nebraska state legislator challenged the legislature's practice of hiring a chaplain to open each session with prayer. He claimed that both the practice of doing so, and particularly the chaplain's salary, were an establishment of religion. Significantly, in upholding both the practice and the payment, Chief Justice Burger's opinion did not even mention the *Lemon* test.⁵²¹ It proceeded directly from the

519. Individualized prayer or opportunities for it may not suffice; for example, the prayer that is said at the beginning of the meal is not substituted for by a prayer at an earlier time of the day; the contemporaneous "blessing" of the food or the activity has a unique value.

520. 463 U.S. 783 (1983).

521. The district court found the prayers constitutional, but not the payment. *Id.* at 785.

fact that the same Congress that adopted the first amendment's religion clauses appointed paid chaplains only three days later.⁵²² The Court seemed to say that, while much of the meaning and intent of the first amendment is murky, one thing we *do* know is that it does not prohibit paid legislative chaplains. Although there is some appeal to the argument that "time makes ancient good uncouth,"⁵²³ it is difficult to strike down as unconstitutional a practice with such formidable pedigree. There are other instances of the leftovers of an era in which public expressions of piety were viewed by the population with greater equanimity.⁵²⁴ In considering the Sunday Closing Law cases,⁵²⁵ the Court noted the overlap between the religious reasons for keeping Sunday as a day of rest and the secular reliance that had grown up around it. "The cause is irrelevant; the fact exists."⁵²⁶

But this sentiment is not universally shared. Professor Laycock, otherwise hospitable to the place of religion in society, has suggested that many of these leftovers are unconstitutional:

The government should not put "In God We Trust" on coins; it should not open court sessions with "God save the United States and this honorable Court"; and it should not name a city or a naval vessel for the Body of Christ or the Queen of the Angels. Perhaps religious minorities should not waste political capital on minor violations such as these. But neither should the Supreme Court legitimate such violations.⁵²⁷

If such an absolutist position were adopted, many cities, including Los Angeles, San Francisco, San Jose, and St. Louis, would be required to change their names. Presumably such practices as the observance of Christmas as a legal holiday would be unconstitutional. Neutrality makes no such unconditional demands; the standard would be whether or not the refusal to change the city's name betrays a discriminatory animus. Whatever harm is caused by the imposition of offensive religious symbols must be balanced against

The Eighth Circuit applied the *Lemon* test and held that neither practice could survive even one of the three prongs of the test. *Id.* at 786.

522. *Id.* at 788.

523. James Russell Lowell, *The Present Crisis*, in POEMS OF JAMES RUSSELL LOWELL 98 (Oxford 1912); see also *supra* note 31 (Professor Giannella's caution about original intent).

524. Marshall, *supra* note 17, at 507-08 ("[r]eligion is simply a fact of public life").

525. See *supra* text accompanying notes 289-300.

526. *McGowan*, 366 U.S. at 452 (1961).

527. Laycock, *supra* note 480, at 8 (footnotes omitted).

the costs, quite substantial, if Professor Laycock is correct, imposed by rooting out all governmental acknowledgements of religion's role in society. "Religion, by virtue of history and tradition, is so enmeshed in American culture that the establishment clause cannot entirely sever government from religion."⁵²⁸ Even assuming that some practice, if judged *de novo* according to the non-discrimination principle suggested above, would not pass muster, weight must be accorded to the secular inconvenience of removing it. Moreover, in many cases such as the legislative chaplaincy, there may be justifications irrespective of their historical pedigree.⁵²⁹ In any event, the search must be for true neutrality, not for mechanical procedures that obviate the need for further analysis.

V. CONCLUSION.

Section III of this article referred to a table in the appendix of the major religion clause cases. In proposing the non-discrimination alternative, this article has described how an alternative test would dispose of the same kinds of cases. Table 2 presents the same cases as those listed in Table 1, with the addition of a column showing "proposed holding." In only a few cases would the rule provide for an outcome different from the holding in the case; most of these cases involve the provision of aid to private schools or claims for exemption based on religious scruples. In all such cases a number of the justices, perhaps now a majority, would have voted for the proposed holding.

This article has detailed a significant weakness in the "affirmative action" approach to the religion clauses: its requirement that "theological impact" be measured to assure equality of treatment. Far from maintaining a "wall of separation" between church and state, this approach threatens the most important guarantee of the first amendment, autonomy of religion and government.

The principle of non-discrimination provides a better starting point for a neutral interpretation of the religion clauses. A consistent and intelligent application of the principles expressed in this

528. Fairchild, *Lynch v. Donnelly: The Case for the Creche*, 29 St. Louis U.L.J. 459, 466 (1985).

529. In the case of legislative chaplains, the same argument can be made as was made for religious observances in the military and public schools: where there is a "pervasive governmental presence," some place must be made for religion. Whether this argument would otherwise be sufficient to justify legislative chaplains in the absence of the historical record is of course problematic.

article will significantly reduce the need to resolve conflicts between church and state, and will promote both governmental authority and religious independence. Although the Supreme Court has clung to a case-by-case determination and a "balancing" of the "tension" between the two clauses, a majority of the justices have expressed the need for a more principled approach. As Professor Marty has said of the neutrality approach, it "at least invokes a principle and does its tempering or compromising on the basis of it."⁵³⁰ Through the elaboration of sensible rules and distinctions, the beginnings of which are suggested in this article, courts can move closer to the ideal of protecting religious liberty.

530. Marty, *supra* note 402, at 183.

Appendix

Table 1. SIGNIFICANT SUPREME COURT RELIGION CLAUSE CASES, 1940-1989

Date	Case Name	Justices and their Votes*										Held?	State Action Challenged (page in text where case discussed)
1940	Cantwell	CH	HB	FF	JM	WD	BP	SR	HS	OR		U	Conviction for soliciting money without municipal council approval
1943	Barnette	HS	HB	FF	WR	WD	FM	SR	RJ	OR		U	Refusal to exempt child from flag salute
1944	Prince	HS	HB	FF	WR	WD	FM	SR	RJ	OR		C	Refusal to exempt sale of religious magazines from child labor laws
1944	Ballard	HS	HB	FF	WR	WD	FM	SR	RJ	OR		C	Mail fraud conviction for representations about religious experiences
1947	Everson	FV	HB	FF	WR	WD	FM	SR	RJ	HB		C	Reimbursement of bus fares for children attending parochial school
1948	McCullum	FV	HB	FF	WR	WD	FM	SR	RJ	HB		U	"Released time" conducted on school grounds by religious teachers
1952	Zorach	FV	HB	FF	SM	WD	TC	SR	RJ	HB		C	"Released time" conducted off school grounds
1952	Kedroff	FV	HB	FF	SM	WD	TC	SR	RJ	HB		U	Refusal to recognize bishop's right to control church property
1961	McGowan	EW	HB	FF	WB	WD	TC	CW	JH	PS		C	Maryland's Sunday Closing Laws
1961	Braunfeld	EW	HB	FF	WB	WD	TC	CW	JH	PS		C	Refusal to exempt Orthodox Jew from Sunday Closing Laws
1961	Torcaso	EW	HB	FF	WB	WD	TC	CW	JH	PS		C	Requirement that applicant for notary license declare belief in God
1962	Engel	EW	HB		WB	WD	TC		JH	PS		U	Daily recitation of prayers composed by state board of regents
1963	Schempp	EW	HB	AG	WB	WD	TC	BW	JH	PS		U	Statute requiring reading of Bible verses to start each school day
1963	Sherbert	EW	HB	AG	WB	WD	TC	BW	JH	PS		U	Unemployment comp. denied to Sabbatarian for refusal to work
1965	Seeger	EW	HB	AF	WB	WD	TC	BW	JH	PS		U	Conscientious objector required to declare belief in a Supreme Being
1968	Allen	EW	HB	AF	WB	WD	TM	BW	JH	PS		C	Public schools required to loan free textbooks to private schools
1968	Epperson	EW	HB	AF	WB	WD	TM	BW	JH	PS		U	Statute prohibiting teaching of evolution
1969	Hull	WB	HB	AF	WB	WD	TM	BW	IH	PS		U	Use of "departure from doctrine" test in terminating religious trust
1970	Walz	WB	HB	AF	WB	WD	TM	BW	JH	PS		C	Statute granting property tax exemptions to religious organizations
1970	Welsh	WB	HB		WB	WD	TM	BW	JH	PS		U	Requirement that conscientious objectors have religious belief
1971	Gillette	WB	HB	HB	WB	WD	TM	BW	JH	PS		C	Requirement that conscientious objectors be opposed to all wars
1971	Lemon	WB	HB	HB	WB	WD	TM	BW	JH	PS		U	State subsidies to teachers at private schools
1971	Tilton	WB	HB	HB	WB	WD	TM	BW	JH	PS		C	Federal subsidies to private colleges
1972	Yoder	WB		HB	WB	WD	TM	BW		PS		U	Refusal to exempt Amish from compulsory school attendance law
1973	Hunt	WB	LP	HB	WB	WD	TM	BW	WR	PS		C	State issuance of revenue bonds for Baptist college
1973	Nyquist	WB	LP	HB	WB	WD	TM	BW	WR	PS		U	Tuition reimbursement and tax credits for private schools
1975	Meek	WB	LP	HB	WB	JS	TM	BW	WR	PS		U	Auxiliary services and instructional materials given to private schools

1976 Milivojevic	WB LP	HB LP	WB JS	TM BW	WR PS	U	State court's requirement of "due process" when defrocking Bishop
1976 Roemer	WB LP	HB JS	WB JS	TM BW	WR PS	C	Payment of block grants to private colleges
1977 TWA	WB LP	HB JS	WB JS	TM BW	WR PS	C	Employer's refusal to accommodate Sabbatarian's work schedule despite EEOC regulations
1977 Wolman	WB LP	HB JS	WB JS	TM BW	WR PS	U	Providing instructional materials and field trips to private schools
1977 Maynard	WB LP	HB JS	WB JS	TM BW	WR PS	U	Conviction for covering state motto on license plate
1980 Stone	WB LP	HB JS	WB JS	TM BW	WR PS	U	Requirement that Ten Commandments be posted in each classroom
1981 Thomas	WB LP	HB JS	WB JS	TM BW	WR SO	U	Unemployment compensation denied to worker quitting for religious reasons
1981 Widmar	WB LP	HB JS	WB JS	TM BW	WR SO	U	University's denial of facilities for groups for religious worship
1981 Lee	WB LP	HB JS	WB JS	TM BW	WR SO	C	Refusal to exempt Amish from contribution to Social Security system
1982 Larson	WB LP	HB JS	WB JS	TM BW	WR SO	U	State registration requirement for charitable organizations receiving less than 50% of revenues from membership
1982 Larkin	WB LP	HB JS	WB JS	TM BW	WR SO	U	Statute granting nearby churches veto power over liquor license
1983 Mueller	WB LP	HB JS	WB JS	TM BW	WR SO	C	Income tax deductions for cost of sending children to private schools
1983 Marsh	WB LP	HB JS	WB JS	TM BW	WR SO	C	Employment of a chaplain to the state legislature
1984 Lynch	WB LP	HB JS	WB JS	TM BW	WR SO	C	Expenditure of City funds for nativity scene in Christmas display
1985 Wallace	WB LP	HB JS	WB JS	TM BW	WR SO	U	State statute authorizing moment of silent meditation "and prayer"
1985 Thornton	WB LP	HB JS	WB JS	TM BW	WR SO	U	State statute requiring accommodation to employee's Sabbath
1985 Gd. Rapids	WB LP	HB JS	WB JS	TM BW	WR SO	U	Public schools giving remedial education in private schools (Title I)
1985 Felton	WB LP	HB JS	WB JS	TM BW	WR SO	U	Public school teachers giving remedial education in private schools
1986 Witters	WB LP	HB JS	WB JS	TM BW	WR SO	U	Vocational rehabilitation aid for blind student to become pastor
1986 Goldman	WB LP	HB JS	WB JS	TM BW	WR SO	C	Dismissal for wearing yarmulke in violation of Air Force regulations
1986 Roy	WB LP	HB JS	WB JS	TM BW	WR SO	C	Use of social security number over objection of American Indian parent
1987 Edwards	WB LP	HB JS	WB JS	TM BW	WR SO	U	Statute requiring creation science to be taught along with evolution
1988 Lyng	WB LP	HB JS	WB JS	TM BW	WR SO	C	Destruction of Indian worship sites by national forest development
1988 AFLA	WB LP	HB JS	WB JS	TM BW	WR SO	C	Federal grants to religious groups for sexuality/parenthood counseling
1989 Bullock	WB LP	HB JS	WB JS	TM BW	WR SO	U	Tax exemption limited to religious publications
1989 Allegheny	WB LP	HB JS	WB JS	TM BW	WR SO	U	Display of crèche adjacent to County office building

*KEY:

INITIALS = Justice voted to hold the state action constitutional

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Table 2. PROPOSED DISPOSITION OF THE RELIGION CLAUSE CASES

Date/Case Name	Held?	Proposed Holding	State Action Challenged (page in text where case discussed)
1940 Cantwell	U	I	Conviction for soliciting money without municipal council approval
1943 Barnette	U	I	Refusal to exempt child from flag salute
1944 Prince	C	C	Refusal to exempt sale of religious magazines from child labor laws
1944 Ballard	C	U*	Mail fraud conviction for representations about religious experiences
1947 Everson	C	C	Reimbursement of bus fares for children attending parochial school
1948 McCollum	U	U	"Released time" conducted on school grounds by religious teachers
1952 Zorach	C	C	"Released time" conducted off school grounds
1952 Kedroff	U	U	Refusal to recognize bishop's right to control church property
1961 McGowan	C	F	Maryland's Sunday Closing Laws
1961 Braunfeld	C	C	Refusal to grant exemption from Sunday Closing Laws to Orthodox Jew
1961 Torcaso	U	U	Requirement that applicant for notary license declare belief in God
1962 Engel	U	U	Daily recitation of prayers composed by state board of regents
1963 Schempp	U	U	Statute requiring reading of Bible verses to start each school day
1963 Sherbert	U	C*	Unemployment compensation denied to Sabbatarian for refusal to work
1965 Seeger	U	C*	Conscientious objector required to declare belief in a Supreme Being
1968 Allen	C	C	Public schools required to loan free textbooks to private schools
1968 Epperson	U	C*	Statute prohibiting teaching of evolution
1969 Hull	U	U	Use of "departure from doctrine" test in terminating religious trust
1970 Walz	C	C	Statute granting property tax exemptions to religious organizations
1970 Welsh	U	C*	Requirement that conscientious objectors have religious belief
1971 Gillette	C	C	Requirement that conscientious objectors be opposed to all wars
1971 Lemon	U	C*	State subsidies to teachers at private schools
1971 Tilton	C	C	Federal subsidies to private colleges
1972 Yoder	U	C*	Refusal to exempt Amish from compulsory school attendance law
1973 Hunt	C	C	State issuance of revenue bonds for Baptist college
1973 Nyquist	U	C*	Subsidies, tuition reimbursement and tax credits for private schools
1975 Meek	U	C*	Auxiliary services and instructional materials given to schools
1976 Milivojeich	U	U	State court's requirement of "due process" when Bishop
1976 Roemer	C	C	Payment of block grants to private colleges
1977 TWA	C	C	Employer's refusal to accommodate Sabbatarian's work schedule EEOC regulations

1977 Wolman	U	C*	Providing instructional materials and field trips to private schools
1977 Maynard	U	I	Conviction for covering state motto on license plate because religious objection
1980 Stone	U	F	Requirement that Ten Commandments be posted on wall of each classroom
1981 Thomas	U	C*	Unemployment compensation denied to worker quitting for reasons
1981 Widmar	U	U	University's denial of facilities for groups for worship
1981 Lee	C	C	Refusal to exempt Amish from contribution to Social Security system
1982 Larson	U	U	State requirement of registration by charitable organizations receiving less than 50% of revenues from membership
1982 Larkin	U	I	Statute granting neighboring churches veto power over liquor license
1983 Mueller	C	C	Income tax deductions for cost of sending children to private schools
1983 Marsh	C	C	Employment of a chaplain to the state legislature
1984 Lynch	C	C	Expenditure of City funds for nativity scene in Christmas display
1985 Wallace	U	C*	State statute authorizing moment of silent meditation "and prayer"
1985 Thornton	U	U	State statute requiring accommodation to employee's Sabbath
1985 Grand Rapids	U	C*	Public schools giving remedial education in private schools (Title I)
1985 Felton	U	C*	Public school teachers giving remedial education in private schools
1986 Witters	C	C	Vocational rehabilitation aid for blind student to become pastor
1986 Goldman	C	C	Dismissal for wearing yarmulke in violation of Air Force regulations
1986 Bowen v. Roy	C	C	Use of social security number over objection of American Indian parent
1987 Edwards	U	C*	Statute requiring creation science to be taught along with evolution
1988 Lyng	C	C	Destruction of Indian worship sites by national forest development
1988 AFLA	C	C	Federal grants to religious groups for sexuality and parenthood counseling
1989 Bullock	U	C*	Tax exemption limited to religious publications
1989 Allegheny	U	C*	Display of crèche adjacent to County office building

KEY TO PROPOSED HOLDINGS:

C = Constitutional

F = Requires further factual analysis of potential discriminatory animus

I = Unconstitutional on grounds independent of the religion clauses

U = Unconstitutional based on the religion clauses

* = Proposed holding differs from Court's holding