1-1-1997

Understanding the Establishment Clause: The Perspective of Constitutional Litigation

Robert A. Sedler
Wayne State University, rsedler@wayne.edu

Recommended Citation

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.
UNDERSTANDING THE ESTABLISHMENT CLAUSE:
THE PERSPECTIVE OF CONSTITUTIONAL LITIGATION

ROBERT A. SEDLER†

Table of Contents

I. INTRODUCTION: THE ESTABLISHMENT CLAUSE AND
THE PERSPECTIVE OF CONSTITUTIONAL LITIGATION. 1318

II. THE STRUCTURE OF THE “LAW OF THE
ESTABLISHMENT CLAUSE” .......................... 1338
A. The Overriding Principle: Complete Official
   Neutrality ............................................ 1338
B. The Operational Principles: The Lemon Test .... 1343
   1. The “Religious Purpose” Principle ............ 1345
   2. The “Advancing Religion” Principle .......... 1346
   3. The “Excessive Entanglement” Principle ...... 1349
C. Subsidiary Doctrines .......................... 1351
   1. Primary Effect and Incidental Benefit ...... 1351
   2. Secular Deism ................................... 1353
   3. Endorsement/Symbolic Union ................. 1355
   4. Accommodation for Religious Freedom, but
      Not for Religion .............................. 1356
   5. The Non-discriminatory Inclusion of Religion 1358
D. The Precedents ............................. 1359

III. THE APPLICATION OF THE LAW OF THE
ESTABLISHMENT CLAUSE .......................... 1365
A. Religious Practices in the Public Schools ........ 1366
B. Financial Aid and Benefits to Religion .......... 1372
   1. Secular Function .............................. 1374
   2. Aid to Religious Schools and Institutions .... 1376
   3. Equal Treatment of Religion ................. 1390

†Professor of Law, Wayne State University. A.B., 1956, University of
Pittsburgh; J.D., 1959, University of Pittsburgh.
I. INTRODUCTION: THE ESTABLISHMENT CLAUSE AND THE PERSPECTIVE OF CONSTITUTIONAL LITIGATION

For quite some time now there has been extensive and ongoing academic criticism of the Supreme Court's Establishment Clause jurisprudence and of its decisions under that jurisprudence. While there are a number of different facets of the academic debate over the proper interpretation and meaning of the Establishment Clause, virtually all the commentators agree that there is

1. The amount of academic commentary on the Establishment Clause and on the religion clauses in general has been enormous. Although the focus of this Article is on the operation of the Establishment Clause in practice, I have examined at least a portion of the voluminous academic commentary at some length and have tried to obtain some understanding of the various aspects of the academic debate. It is not my purpose in this Article to join in that debate, and I have little interest in doing so. Nevertheless, I have cited a number of academic writings where they seemed relevant to the discussion at hand.

2. The debate over the proper interpretation and meaning of the Establishment Clause is often influenced, at least in part, by the particular commentator's "separationist" or "accommodationist" agenda. The "separationist" agenda calls for an expansive interpretation of the Establishment Clause so as to invalidate most governmental involvements with religion. The "accommodationist" agenda calls for a narrower interpretation of the Establishment Clause that would uphold a broad range of governmental involvements with religion. The "accommodationist" agenda to which I refer should not be confused with the proposition discussed in Part II.E., infra, that the Establishment Clause permits the government to take certain actions designed to protect the religious freedom of individuals and religious institutions. See Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 686-87 (1992) (discussing the distinction between "governmental action that acknowledges or expresses the prevailing religious sentiment of the community" and "government laws or
something seriously wrong with the Court's approach to the resolution of Establishment Clause issues. A common thread running through this criticism is that the Court has failed to develop and articulate an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system.3

Much of the criticism of the Court's approach to the Establishment Clause relates to the Court's use of the "Lemon test" as the articulated methodology to resolve all of the Establishment Clause issues coming before it for decision.5 This criticism

policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion).  

The Court's inconsistency pervades more than just the results of the cases; the Court has also wavered constantly in its depiction of the underlying theory of the Establishment Clause. At times the Court has indicated the clause mandates a wall of separation between church and state. At other times, the Court has stated that neutrality is required. In still other instances, the Court has spoken of accommodation . . . .

. . . .

It is then, no wonder that establishment jurisprudence has been universally criticized. The Court itself has acknowledged its own 'considerable internal inconsistency,' [quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)] candidly admitting that it has 'sacrifice[d] clarity and predictability for flexibility,' [quoting Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980)] and commentators have found the area hopelessly confused.  
Id. at 496-97 (footnotes omitted).

5. See generally Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 389 (1993) (Scalia, J., concurring) ("I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the crooked lines and wavering shapes its intermittent use has produced"); Allegheny County v. ACLU, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part, dissenting in part) (noting that "[p]ersuasive criticism of Lemon has emerged"); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) (noting that "this action once again illustrates certain difficulties inherent in the Court's use of the [Lemon] test," and that there is a "tension in the Court's use of the Lemon
regarding the *Lemon* test has surfaced among members of the Court itself.\(^6\) According to one commentator, the *Lemon* test is "irrelevant or indeterminate when applied to most serious Establishment Clause issues."\(^7\) Another commentator argues that the broad disagreements about the meaning and viability of the *Lemon* test have rendered the test "only an imperfect tool for enforcing the separation principle," and have "produced an area of law that is chaotic and utterly unpredictable."\(^8\) Some commentators, relying on Justice Kennedy's reference to "coercion" in his opinion for the Court in *Lee v. Weisman*,\(^9\) went so far as to say that the Court had replaced the *Lemon* test with a new "coercion" test,\(^10\) only to be disabused of this notion by the Court in post-*Lee* cases in which "coercion," or the absence thereof, played no part in the Court's Establishment Clause analysis.\(^11\)

Going beyond the deficiencies in the *Lemon* test, another commentator has criticized the Court's Establishment Clause test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion*); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (arguing that the *Lemon* test has "not provided adequate standards for deciding Establishment Clause cases").\(^6\) See *supra* note 5.

\(^{7}\) McConnell, *supra* note 2, at 686.


Unlike the high school commencement prayer invalidated in *Lee*, the practices challenged as violative of the Establishment Clause in these cases had no effect at all, "coercive" or otherwise, on anyone else. The absence of coercion was irrelevant in the Court's Establishment Clause analysis; in *Kiryas Joel*, the Court held that the state had violated the Establishment Clause by setting up a special school district that encompassed the boundaries of a religious community. See *Kiryas Joel*, 512 U.S. at 690.
jurisprudence as being more symbolic than substantive, so that the Court has been less concerned with the substantive goal of limiting certain types of governmental involvements and supports of religion than it has been with eliminating the perception of improper governmental action. As a result, the criticism goes, programs with only minimally favorable religious effects may create Establishment Clause problems while programs with highly substantial effects may not.

One of the most prominent Establishment Clause commentators, Professor Jesse Choper, has recently set forth a comprehensive theory as to the meaning of the Establishment Clause which would reshape completely the Court’s Establishment Clause jurisprudence and redefine the function of the Establishment Clause in terms of “securing religious liberty.” Under Professor Choper’s thesis, the Establishment Clause and the Free Exercise Clause, taken together, would be interpreted in light of four principles: the deliberate disadvantage principle, the burdensome effect principle, the intentional advantage principle, and the independent impact principle. Applying these principles to the Court’s decided cases, Professor Choper would reach dramatically different results from those reached by the Court, sometimes finding an Establishment Clause violation when the Court did not, and sometimes finding no violation when the Court did.

Looking at the extensive and ongoing academic criticism of the Court’s Establishment Clause jurisprudence and its decisions under that jurisprudence, an objective observer might be tempted to ask, “How could it be that the Court has been so wrong?” The inquiry would continue with questions such as, “Why has the Court failed to develop an underlying theory as to the meaning of the

12. See Marshall, supra note 3, at 498. Professor Marshall contends that only a symbolic understanding of the Establishment Clause “serves to reconcile the otherwise unintelligible pattern of Supreme Court decisions.” Id.

13. See id. at 531-32.


Establishment Clause and its function in our constitutional scheme?,” “Why has the Court continued to adhere to the Lemon test despite its obvious deficiencies?,” “Why has the Court seemingly been more concerned with symbolism than with substance?,” “Why are the Court’s Establishment Clause decisions so unintelligible and unpredictable?”

I have a very different view of the Court’s Establishment Clause jurisprudence and its decisions under that jurisprudence. Most of the academic commentators approach the Establishment Clause from a truly academic perspective. They search for an underlying theory of the Establishment Clause that would provide answers to all Establishment Clause questions within the analytical framework of that underlying theory and that would produce results consistent with the premises on which the theory is based. My view of the Court’s Establishment Clause jurisprudence is not based on the search for an underlying theory or on the perceived absence of such a theory in the Court’s Establishment Clause jurisprudence. Rather, my view has been formed by my experience as a constitutional litigator in litigating and advising on Establishment Clause issues and in trying to bring this experience to bear in explaining the Establishment Clause to my students.

I submit that when one looks at the Establishment Clause from the perspective of constitutional litigation, it is indeed possible to ascertain what may be referred to as the “law of the Establishment Clause.” The “law of the Establishment Clause” is not at all difficult to understand or to apply to the resolution of the Establishment Clause issues that in fact arise in practice. It is the “law of the Establishment Clause” that is used by litigating lawyers and by the courts—including the Supreme Court—to litigate and resolve these issues.

The purpose of this writing is to explain the nature and operation of the “law of the Establishment Clause.” As will be

16. Above all, “Why does the Court not heed the criticism of the academic commentators and reformulate its approach to the Establishment Clause along lines that will be acceptable to the academic commentators?”
demonstrated, the "law of the Establishment Clause" consists of four elements. First, there is an overriding principle: the Establishment Clause commands complete official neutrality toward religion. Second, there are three operative principles, the three prongs of the Lemon test. Third, there are a number of subsidiary doctrines, mostly relating to the application of the second Lemon "effect of advancing religion" prong. Fourth, and most importantly in practice, there are the Court's precedents in what I have identified as the five major areas of Establishment Clause litigation: (1) religious practices in the public schools; (2) financial aid or governmental benefits to religion; (3) governmental action purportedly "advancing religion"; (4) "entanglement" or governmental interference in religious matters; and (5) preference for religion or between religions, which includes governmental action to protect the religious freedom of individuals or institutions.

The "law of the Establishment Clause" is found in the Establishment Clause cases decided by the Supreme Court and in the Court's opinions setting forth its reasons for deciding those cases as it did. As in other areas of constitutional law, the "law of the Establishment Clause" has developed in a line of growth through the process of constitutional litigation. Because the process of constitutional litigation consists of case-by-case adjudication of specific issues, it is not a process that readily lends itself to the development of a comprehensive underlying theory or broad, general propositions. Rather, in its case-by-case


18. In their demand that the Supreme Court formulate a comprehensive underlying theory and promulgate broad, general propositions of constitutional law, academic commentators may sometimes lose sight of the fact that the Court's constitutional jurisdiction is limited to deciding the "case or controversy" before it, and that the Court is supposed to decide constitutional issues on the "narrowest possible ground." As the Court has stated, a
judication of specific Establishment Clause issues, the Court has promulgated principles and doctrines and has established precedents. These principles, doctrines, and precedents are applied in subsequent cases, where they may undergo some degree of refinement and modification. The precedents build on each other and form a "cluster of precedents" in the different Establishment Clause areas. These "cluster of precedents" are drawn upon whenever a new issue arises in a particular area; and the precedents, supplemented when necessary by applicable principles and doctrines, provide the parameters for the resolution of the new Establishment Clause issue before the Court.

The "law of the Establishment Clause," as it exists today, has been developing for almost fifty years. During this time, a large number of specific Establishment Clause issues have been resolved by the Court, "clusters of precedents" have been created in all of the major areas of Establishment Clause litigation, and principles and doctrines have been promulgated, refined, and applied in a number of contexts. As a result, the "law of the Establishment Clause" may be considered to be fairly settled, and the new Establishment Clause issues that arise are litigated and resolved within the analytical framework of the existing precedents, doctrines, and principles.

I will illustrate this point by discussing two Sixth Circuit cases that I litigated for the American Civil Liberties Union of Michigan. Both cases presented Establishment Clause issues that were ultimately resolved by the Supreme Court in later cases. The first case, ACLU v. City of Birmingham, involved the display of a

---

constitutional ruling should not be formulated "in broader terms than are required by the precise facts to which the ruling is to be applied." Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947). Thus, in an Establishment Clause case coming before the Court, the Court's focus is properly on the resolution of the particular Establishment Clause issue presented rather than on the formulation of a comprehensive underlying theory or the promulgation of broad, general principles of Establishment Clause jurisprudence.

19. The Court's modern Establishment Clause jurisprudence is considered to have begun with Everson v. Board of Education, 330 U.S. 1 (1947).
20. 791 F.2d 1561 (6th Cir. 1986).
Nativity Scene on public property during the Christmas holiday season, and so was the precursor to *Allegheny County v. ACLU*.

The second case, *Stein v. Plainwell Board of Education*, involved prayers at a high school commencement, and so was the precursor to *Lee v. Weisman*.

In *Birmingham*, the plaintiffs challenged the city of Birmingham's display of an unadorned nativity scene on the city hall front lawn. While that case was pending before the District Court, the Supreme Court decided *Lynch v. Donnelly*, where it held that the inclusion of a nativity scene display within a larger display containing a Santa Claus, Christmas trees, toy animals, and other secular symbols of Christmas, did not violate the Establishment Clause. *Lynch* then became the controlling precedent in *Birmingham*, and that case was litigated by both sides almost entirely within the confines of *Lynch*. In *Lynch*, Chief Justice Burger's opinion for the Court emphasized that the Nativity Scene display occurred only once a year and was an appropriate "public acknowledgment" of the significance of the Christmas holiday. It was evident that the inclusion of the secular symbols of Christmas in the display was not important to the Chief Justice and the three other Justices who unqualifiedly joined in the Burger opinion, and that these four Justices would have upheld an unadorned nativity scene display against Establishment Clause challenge. However,

---

22. 822 F.2d 1406 (6th Cir. 1987).
24. See *Birmingham*, 791 F.2d at 1561-62.
26. See id. at 678-85.
27. This was the position of four dissenting Justices in *Allegheny County*, including then Chief Justice Rehnquist and Justice White, who had joined the Burger opinion in *Lynch*. As did the Burger opinion in *Lynch*, Justice Kennedy's dissent in *Allegheny County* argued that there was no Establishment Clause violation when a governmental body made use of a nativity scene display to acknowledge the public celebration of the Christmas holiday. See *Allegheny County v. ACLU*, 492 U.S. 573, 663-67 (1989) (Kennedy, J., concurring in part, dissenting in part).
the inclusion of the secular symbols of Christmas in the display was crucial to Justice O'Connor, who provided the fifth vote for the majority. For this reason, the "no endorsement of Christianity" rationale of her concurrence became the basis of the Court's holding in *Lynch* as the narrowest ground of agreement among the Justices in the majority.²⁸

The litigation in the *Birmingham* case, therefore, centered around the application of the "no endorsement of Christianity" rationale of the O'Connor concurrence in *Lynch* to Birmingham's display of the unadorned nativity scene.²⁹ The lawyer for Birmingham argued that the unadorned nativity scene displayed during the Christmas season was not an endorsement of Christianity, but was merely the city's public acknowledgment of the significance of the Christmas season. This being so, he contended that under *Lynch*, the display was constitutionally permissible.³⁰ I argued to the contrary, that the nativity scene standing alone—unlike the inclusion of a nativity scene in a larger display with the secular symbols of Christmas as in *Lynch*—did indeed amount to an endorsement of Christianity, and was therefore, under the *Lynch* holding, unconstitutional.³¹ The District Judge and two of the three Sixth Circuit judges agreed with my position. When the identical issue came before the Supreme Court in *Allegheny County*, the Court's analysis likewise revolved around the application of the *Lynch* holding to the display of an unadorned nativity scene.³² Five of the Justices took the position that the

---

²⁸. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). It does not matter that the "narrowest position" is that taken by a single Justice, as per Justice O'Connor's concurrence in *Lynch*.

²⁹. *See generally Birmingham*, 791 F.2d 1561.

³⁰. *See id.* at 1564.

³¹. *See id.*

³². *See id.*
unadorned nativity scene was an endorsement of Christianity, while four Justices took the position that it was not.

This example clearly illustrates how the "law of the Establishment Clause" operates in actual litigation. First, the starting point for analysis—by the lawyers, by the lower courts, and by the Supreme Court itself—is the Supreme Court precedent or precedents that are most applicable to the resolution of the particular issue now before the court. Because the issue presented in *Lynch* was substantially the same as the issue presented in *Birmingham* and *Allegheny County*, the argument and analysis did not need to go beyond the application of *Lynch*. To the extent that more general principles or doctrines were relevant, it was only as those principles and doctrines had been applied by the Court in *Lynch*. Second, the Sixth Circuit and the Supreme Court decided only the relatively narrow issue presented in the case. The precedential effect of the decision would not go much beyond the constitutional permissibility of governmentally-sponsored displays of religious symbols. At most, the decision might have some peripheral relevance to the resolution of other issues in the area of governmental action purportedly "advancing religion."

The *Stein* case, like *Lee*, involved the constitutionality of a once-a-year prayer at a high school commencement. Neither case, it must be emphasized, raised any question about the constitutionality of officially sponsored school prayer in other circumstances, such as the classroom setting. While so-called "voluntary" prayer—usually meaning officially-sponsored prayer in the classroom setting, from which objecting students may be excused—is an important political

33. The five Justices were Justice O'Connor and the four *Lynch* dissenters, Justices Brennan, Marshall, Blackmun, and Stevens.

34. Those four were Chief Justice Rehnquist and Justice White, who were part of the *Lynch* majority, and Justices Scalia and Kennedy, who were not on the Court when *Lynch* was decided.

35. *See infra* notes 320-29 and accompanying text (discussing the display of religious symbol cases).

issue, there is no question that under current constitutional doctrine and precedent, any officially-sponsored prayer in the classroom setting is unconstitutional.\textsuperscript{37} It would still be unconstitutional even if the Supreme Court had upheld the constitutionality of prayer at high school commencement in \textit{Lee}. In \textit{Stein} and \textit{Lee}, the lawyers for the school board argued that prayer at commencement was very different from prayer in the classroom.\textsuperscript{38} They argued that while under the Court's precedents, prayer in the classroom was deemed to have the effect of "advancing religion," and as a result was unconstitutional, prayer at commencement had the secular effect of solemnizing a formal occasion and, therefore, was constitutionally permissible.\textsuperscript{39} The lawyers for the plaintiffs argued that "prayer was prayer," and that all officially-sponsored prayer, whether in the classroom or at commencement, had the effect of "advancing religion" and was unconstitutional.\textsuperscript{40}

The issue presented in \textit{Stein} and \textit{Lee}, like the issue presented in \textit{Birmingham} and \textit{Allegheny County}, was a relatively narrow one: did prayer at a high school commencement have the constitutionally permissible secular effect of solemnizing a formal occasion, or did it have the constitutionally impermissible effect of "advancing religion"?\textsuperscript{41} The resolution of that issue depended in no small part on the Court's evaluation of the particular circumstances surrounding the saying of prayers at a high school commencement and the impact of the prayer on the audience. It was obviously a close question, and the Court divided five-four in its resolution.\textsuperscript{42} The point that I want to emphasize is that the case was about prayer at commencement, not about school prayer in any other context, and the resolution of that issue depended on the application of the Court's precedents and settled doctrine to the

\begin{flushleft}
\textsuperscript{38} See \textit{Stein}, 822 F.2d at 1408; \textit{Lee}, 505 U.S. at 595.
\textsuperscript{39} See \textit{Stein}, 822 F.2d at 1407-08; \textit{Lee}, 505 U.S. at 588-89.
\textsuperscript{40} See \textit{Stein}, 822 F.2d at 1408; \textit{Lee}, 505 U.S. at 590-93.
\textsuperscript{41} See \textit{Stein}, 822 F.2d at 1407; \textit{Lee}, 505 U.S. at 580.
\textsuperscript{42} See \textit{Lee}, 505 U.S. at 579.
\end{flushleft}
facts surrounding this kind of prayer.

The litigation perspective that I have tried to bring to the Court's decisions in *Allegheny County* and *Lee* may be helpful in understanding all of the Court's Establishment Clause decisions in recent years. I will illustrate this point by a consideration of the four Establishment Clause cases decided by the Court after *Lee* in the years 1993-1995. The issues presented in these cases were also relatively narrow issues, and their resolution, like the resolution of the issues presented in *Allegheny County* and *Lee*, depended on the Court's application of its precedents and settled doctrine to the facts of the particular case. Among most members of the Court, there appeared to be no disposition to question the soundness of those precedents and doctrines or to cast about for "new doctrine" or for a broad underlying theory of the meaning of the Establishment Clause and its function in our constitutional scheme.

In the first of these cases, *Zobrest v. Catalina Foothills School District*, the Court held, five-four, that a school district which provided sign-language interpreters for hearing-impaired students in its schools was not precluded by the Establishment Clause from

---

43. The Court did not decide any Establishment Clause cases during its 1995 Term. In the Court's 1996 Term, the Court decided an important Establishment Clause case involving the constitutional permissibility of governmental aid to students attending parochial schools. *Agostini v. Felton*, 117 S. Ct. 1997 (1997). Although this article had been substantially completed some considerable time before *Agostini* was decided, I have incorporated a discussion of that decision into the relevant portions of this Article. Although, as will be discussed, the Court in *Agostini* overruled two prior decisions involving governmental aid to students attending parochial schools, the Court emphasized that those decisions had been eroded by subsequent decisions and were "inconsistent with [the Court's] current understanding of the Establishment Clause." *Id.* at 2017. The issue in *Agostini*—whether Title I remedial services could be provided by public school employees to parochial students in parochial school classrooms—was resolved within the parameters of settled Establishment Clause principles, doctrines, and precedents, notwithstanding that the Court concluded that two earlier precedents were inconsistent with subsequent precedents and with the application of relevant Establishment Clause principles and doctrines in the later cases.

44. 509 U.S. 1 (1993).
providing a sign-language interpreter for a hearing-impaired student who transferred to a parochial school. The issue in that case involved the application of a doctrine, first promulgated in *Everson v. Board of Education*, that while the Establishment Clause generally precludes the state from providing financial assistance to parochial schools, it permits the state to provide certain benefits that it provides to children attending public schools to children attending parochial schools. The application of that doctrine in *Zobrest* interacted with another doctrine, that the government may not act in such a way as to create a symbolic union between government and religion. Applying the latter doctrine, the Court had previously held that a school board may not provide remedial services to parochial school students in parochial school classrooms. In *Zobrest*, the majority took the position that the presence of a school board-supplied interpreter for the hearing-impaired student in the parochial school classroom did not create a symbolic union between government and religion. The dissenters took the opposite position. Again, in light of applicable doctrine and precedent, the issue presented in *Zobrest* was a close one, and the members of the Court disagreed on the application of that doctrine and precedent to the resolution of this issue. And again, the issue was a narrow one, and the precedential effect of the Court’s holding in the case is relatively limited.

In *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court was faced with a highly unusual situation in which the state created a school district embracing only the boundaries of a specific religious community. The state’s purpose in creating this district was to enable the district to provide

45. See id. at 13-14.
47. See Zobrest, 509 U.S. at 8.
49. See Zobrest, 509 U.S. at 13.
remedial education for the children of the religious community.\footnote{51} These children attended sectarian schools operated by the community, and the community had objected to their being required to receive remedial education in a public school district.\footnote{52} While different members of the Court majority were not in full agreement as to why the creation of the school district violated the Establishment Clause, the common thread running through the various opinions was that the state's action had the purpose and effect of benefiting the religious community.\footnote{53} The dissenting Justices saw this as a constitutionally permissible effort to accommodate the religious needs of the children living in the district.\footnote{54}

_Capitol Square Review and Advisory Board v. Pinette_\footnote{55} and _Rosenberger v. University of Virginia_\footnote{56} both involved the question of whether the government's exclusion of religiously-based private speech from a benefit provided to other similarly-situated private speech could be justified by a need to comply with the Establishment Clause. If the government's inclusion of religiously-based private speech in the granting of a benefit provided to other similarly-situated private speech did not violate the Establishment Clause, then the exclusion of such speech would in turn violate the First Amendment's free speech guarantee. In both cases the Court held that the inclusion of religiously-based private speech and the benefit provided to other similarly-situated private speech did not violate the Establishment Clause.\footnote{57}

In _Capitol Square_, the state of Ohio had dedicated Capitol Square, the statehouse plaza, as a public forum.\footnote{58} The Ku Klux Klan sought to display a Latin Cross in Capitol Square during the

\footnotesize{\begin{itemize}
\item 51. See id. at 693.
\item 52. See id. at 692.
\item 53. See id. at 702-05, 716-18 (O'Connor, J., concurring).
\item 54. See id. at 743-48.
\item 55. 515 U.S. 753 (1995).
\item 56. 515 U.S. 819 (1995).
\item 57. See _Capitol Square_, 515 U.S. at 770; _Rosenberger_, 515 U.S. at 845-46.
\item 58. See _Capitol Square_, 515 U.S. at 757.
\end{itemize}}
Christmas holiday season. The state denied the request on the ground that to allow the display would be violative of the Establishment Clause; this was the only question before the Supreme Court in Capitol Square. The Court held, seven-two, that allowing the display would not violate the Establishment Clause, and this being so, the First Amendment's equal access principle required the state to allow the display. However, the rationale of the four Justice plurality—Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas—differed considerably from that of Justices Souter, O'Connor, and Breyer, who joined to form the majority. The two dissenting Justices, Justices Stevens and Ginsburg, agreed with Justices Souter, O'Connor, and Breyer on the rationale but disagreed with their application of that rationale to the facts of the case.

Approaching this case from the perspective of constitutional litigation, we start off with the applicable precedents. One precedent was Allegheny County, where, as discussed previously, the Court held that the display of an unadorned nativity scene on public property violated the Establishment Clause because it had the effect of "advancing religion." In determining whether the display had the effect of "advancing religion" in Allegheny County, the Court majority invoked what I refer to as a subsidiary Establishment Clause doctrine: when a governmental practice has the effect of endorsing religion over non-religion or creating a symbolic union between government and religion, that practice has the effect of "advancing religion" and so is unconstitutional. The majority concluded that the display of an unadorned nativity scene on public property had the effect of endorsing Christianity and so had the constitutionally impermissible effect of "advancing

59. See id. at 758.
60. See id. at 759-60.
61. See id. at 770.
62. See id. at 757-94.
63. See id. at 797-818.
64. See generally Allegheny County v. ACLU, 492 U.S. 573 (1989).
Another set of precedents involved the access of religiously-based speech to the public forum. In these cases, involving a public university and public schools, the Court had held that allowing religiously-based speech equal access to these public forums did not amount to endorsement of religion over non-religion and so did not have the constitutionally impermissible effect of “advancing religion.”

The lawyer for the Ku Klux Klan invoked the equal access line of cases to support the argument that the state did not violate the Establishment Clause by allowing the Ku Klux Klan to display the Latin Cross in Capital Square during the Christmas holiday season. The lawyer for the state distinguished that line of cases by invoking Allegheny County and arguing that a display of a religious symbol on public property, even by a private organization, would have the effect of endorsing religion because the display would be perceived by an “objective observer” as being state-sponsored.

In the three separate opinions that were filed in this case, all of the Justices approached the resolution of the issue with reference to the Allegheny County precedent and the equal access precedents. That is, all of the Justices agreed that if the effect of the state’s allowing the display was an endorsement of Christianity, the state could not allow it. What they disagreed about was the proper method for determining whether the state allowing the display had this constitutionally impermissible effect. The four Justices joining the Scalia plurality opinion disagreed with the three other Justices making up the majority and the two dissenters. The Scalia plurality rejected the “perception of an objective observer” test, insisting instead that so long as the display was sponsored by a private entity

65. See id. at 598-602.
67. See Capitol Square, 515 U.S. at 759-60.
68. See id. at 764-65. In Allegheny County, the Court majority had defined “endorsement” with reference to the perception of an objective observer. See Allegheny County, 492 U.S. at 593-97.
and took place in a public forum open to all on equal terms, there could be no governmental endorsement of religion.\(^6\) The other five Justices continued to adhere to the "perception of an objective observer" test,\(^7\) and so this test remains as the test to be applied to determine whether a particular display on governmental property has the constitutionally impermissible effect of endorsing religion. Applying that test, Justices O'Connor, Souter, and Breyer concluded that the particular display did not have the effect of endorsing Christianity,\(^8\) while Justices Stevens and Ginsburg concluded that it did.\(^9\) Thus, seven Justices ended up taking the position that the city allowing the particular display to take place on public property did not have the effect of endorsing Christianity, and so was constitutionally permissible.

In *Rosenberger*, the University of Virginia authorized payments from the Student Activities Fund, supported by student fees, to contractors outside of the University to subsidize publication printing costs incurred by a variety of student groups.\(^10\) It refused to authorize payment for the printing costs of a religiously-oriented student publication on the ground that to do so would violate the Establishment Clause.\(^11\) The lawyer for the student publication invoked the equal access line of cases, arguing that there was no difference between a public university permitting a religiously-oriented student organization to use university facilities\(^12\) and a public university paying the printing costs of a religiously oriented student publication.\(^13\) The lawyer for the university argued that the state's use of public funds to pay for the printing of a religiously-

---

69. See *Capitol Square*, 515 U.S. at 763-69.
70. See id. at 773-78 (O'Connor, J., concurring), 785-92 (Souter, J., concurring).
71. See id. at 772-83 (O'Connor, J., concurring), 783-94 (Souter, J., concurring).
72. See id. at 797-815 (Stevens, J., dissenting).
74. See id.
75. See id. This had been upheld against the Establishment Clause challenge in *Widmar v. Vincent*, 454 U.S. 263 (1981).
oriented student publication was impermissible under the long line of precedents prohibiting the use of public funds for religious purposes.\textsuperscript{77}

In a five-four decision, the Court held that the university’s payment of the printing costs of a religiously-oriented student publication, along with the printing costs of other student publications, did not violate the Establishment Clause.\textsuperscript{78} This being so, the university’s refusal to pay the printing costs of the religiously-oriented student publication violated the First Amendment’s equal access principle.\textsuperscript{79} The Court’s opinion, authored by Justice Kennedy and joined in by Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, and Justice Thomas, took the position that the governmental program here was neutral toward religion, in that the program was for the benefit of all student publications.\textsuperscript{80} According to Justice Kennedy, “The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches.”\textsuperscript{81} Justice Kennedy went on to say that just as it does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including those that use the facilities for religious purposes, it does not violate the Establishment Clause for the university to pay outside printers to print student publications, including those which are religiously-oriented.\textsuperscript{82} The dissent, authored by Justice Souter and joined in by Justices Stevens, Ginsburg, and Breyer,

\textsuperscript{77} See id. at 831-37. The case was argued by two law professors, Professor Michael W. McConnell of the University of Chicago for the plaintiffs, and Professor John C. Jeffries, Jr., of the University of Virginia for the university. The Fourth Circuit had held that while the university had discriminated against religious speech on the basis of its content, the discrimination was justified by the “compelling interest in maintaining strict separation of church and state.” Id. at 828.

\textsuperscript{78} See id. at 842-46.

\textsuperscript{79} See id. at 835.

\textsuperscript{80} See id. at 840-41.

\textsuperscript{81} Id. at 840.

\textsuperscript{82} See id. at 842-46.
contended that the Establishment Clause prohibited a public university from paying for the printing of any religious message, and that the impermissibility of this form of aid to religion was not obviated by the fact that the message was that of a student group and that the university paid for the printing of non-religious messages by other student groups.\footnote{3}

Most relevant to my thesis of understanding the Establishment Clause from the perspective of constitutional litigation is the concurring opinion of Justice O'Connor.\footnote{4} In Justice O'Connor's view, this was a "hard case" because "it lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."\footnote{5} As she further explained:

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging--sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.\footnote{6}

Looking to the particular facts of this case, Justice O'Connor upheld the payment of funds to outside printers on the grounds that (1) the student organization was completely separate from the university, (2) the funds were paid directly to the outside printer and so could only be used for printing the publication, and (3) there could be no perception of governmental endorsement of the publication's religious message, as fifteen other publications were supported by the university in the same manner.\footnote{7} Thus, she concluded that there was no danger in this case of an impermissible

\begin{itemize}
  \item \footnote{83. See \textit{id.} at 876-99.}
  \item \footnote{84. See \textit{id.} at 846-52.}
  \item \footnote{85. \textit{Id.} at 847.}
  \item \footnote{86. \textit{Id.}}
  \item \footnote{87. See \textit{id.} at 846-52.}
\end{itemize}
My point here is that the Court’s four recent Establishment Clause cases demonstrate how Establishment Clause cases are litigated and resolved within the parameters of settled Establishment Clause principles, doctrines, and precedents. The issues in these cases were relatively narrow, and as the O’Connor concurrence in *Rosenberger* makes clear, their resolution depended to some degree on the precise facts of the particular case. It is obvious that there is sharp disagreement among some members of the current Court in Establishment Clause cases. Looking to their votes and their opinions, Chief Justice Rehnquist and Justices Scalia and Thomas may be said to have an “accommodationist” agenda and tend to reject Establishment Clause challenges. At the other end of the spectrum, Justices Stevens, Souter, Ginsburg, and Breyer may be said to have a “separationist” agenda and tend to uphold Establishment Clause challenges. Here, as in a number of other areas of constitutional law, Justices O’Connor and Kennedy appear to be the “swing” Justices, and except for *Allegheny County*, have voted together in every recent Establishment Clause case to make up the Court majority upholding or rejecting the particular Establishment Clause challenge.

88. See id. at 848-52.
89. See generally supra note 2.
90. See id.
91. Justice O’Connor provided the fifth vote for upholding the Establishment Clause challenge in *Allegheny County*, while Justice Kennedy dissented in that case. Both were a part of the five-four majority upholding the Establishment Clause challenge in *Lee* and rejecting the Establishment Clause challenge in *Zobrest* and *Rosenberger*. They also voted together to form a part of the Court majority that upheld the Establishment Clause challenge in *Kiryas Joel* and rejected it in *Capitol Square*. In the Court’s most recent Establishment Clause case, *Agostini v. Felton*, 117 S. Ct. 1997 (1997), Justice O’Connor and Justice Kennedy, in an opinion by Justice O’Connor, joined Chief Justice Rehnquist and Justices Scalia and Thomas to hold that the Establishment Clause did not prohibit the state from using public school employees to provide Title I remedial services to parochial school students in parochial school classrooms. See id. at 2016. Justices Souter, Stevens, Ginsburg, and Breyer dissented.
However, the apparent conflict between the "accommodationist" and "separationist" wings of the Court, with Justices O'Connor and Kennedy casting the "swing" votes, has been played out within the parameters of settled Establishment Clause principles, doctrines, and precedents. The "accommodationists" tend to apply the principles, doctrines, and precedents in such a way as to lead to the rejection of the Establishment Clause challenge in the particular case, while the "separationists" tend to apply them in such a way as to lead to the upholding of the Establishment Clause challenge. Justices O'Connor and Kennedy tend to apply them in a more "balanced" way, putting more emphasis on the facts of the particular case. But all of the Justices are utilizing the same tools. And it is these tools that are utilized by the lower courts in deciding the great run of Establishment Clause cases that never reach the Supreme Court.92

II. THE STRUCTURE OF THE "LAW OF THE ESTABLISHMENT CLAUSE"

As stated at the outset, there are four components to the law of the Establishment Clause: (1) an overriding principle; (2) three operational principles; (3) a number of subsidiary doctrines; and (4) the Court’s precedents in the five major areas of Establishment Clause litigation.

A. The Overriding Principle: Complete Official Neutrality

The overriding principle of the Establishment Clause is that the Establishment Clause commands complete official neutrality

92. The fact that the cases coming before the Supreme Court are seemingly difficult for the Court to resolve should not obscure the fact that the great run of Establishment Clause cases, which end up being decided by the federal courts of appeal and the state courts, are much easier for those courts to resolve. This is because those cases are less likely to involve the application of conflicting lines of authority, so to speak, and are more likely to be controlled by the Supreme Court’s precedents in the five major areas of Establishment Clause litigation.
toward religion. The government cannot favor religion over non-religion, and it cannot favor one religion over another. The overriding principle of complete official neutrality toward religion has replaced the earlier concept of the Establishment Clause as creating a "wall of separation between church and state." The problems with the "wall of separation" concept were pointed out by Justice Douglas in Zorach v. Clauson. Justice Douglas noted that while the First Amendment "reflects the philosophy that Church and State should be separated," "[it] does not say that in every and all respects there shall be a separation of Church and State." Rather, "it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." The neutrality principle furthers the "philosophy of separation," by precluding the government from favoring religion, but at the same time, it does not require the government to be hostile to religion. Because the Establishment Clause does not require the government to be hostile to religion, the government can include religious institutions in the services it provides to the public generally, such as police and fire

94. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 146, 164 (1878)). In Everson, the first modern Establishment Clause case, Justice Black, writing for the Court, stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation' between church and State." Id. at 16 (quoting Reynolds, 98 U.S. at 164).
95. 343 U.S. 306 (1952).
96. Id. at 312.
97. Id.
98. The Court emphasized the "philosophy of separation" in Engel v. Vitale, 370 U.S. 421 (1962), when it noted that "a union of government and religion tends to destroy government and degrade religion." Id. at 431.
99. As the Court noted in Everson: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them." Everson, 330 U.S. at 18.
and likewise, the government can include religious institutions among recipients of governmental funding to provide secular services. In addition, as we have seen in our discussion of Capitol Square and Rosenberger, the Court has also held that the principle of complete official neutrality is not necessarily breached when the government provides religious organizations with equal access to governmental facilities, such as access to a public forum.

This being so, when the provision of equal access for religious organizations to a public forum does not violate the Establishment Clause, such equal access is required by the First Amendment's equal access principle.

The overriding principle of complete official neutrality toward religion is as close as the Court is likely to come in formulating an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system. In view of this overriding principle, the Court has in effect said that the function of the Establishment Clause in our constitutional system is to promote complete official neutrality toward religion. In theory, the constitutionality of any governmental action involving religion depends on whether or not that action is consistent with this overriding principle. This overriding principle, of course, does

100. As Professor Laycock has noted, police and fire protection are such a universal part of our lives that they have become part of the baseline, and to deny them to churches would "put religion outside the protection of the law." Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 993, 1005 (1990).


103. See supra note 66 and accompanying text.

104. The overriding principle of complete official neutrality toward religion means that "religious belief and practice are insulated even from government persuasion." Douglas Laycock, The Benefits of the Establishment Clause, 42 DEPAUL L. REV. 373, 373 (1992). Professor Laycock goes on to observe that "[i]n terms of history, in terms of comparative law, and in terms of what the rest of
not provide much guidance in determining whether or not a particular governmental practice involving religion violates the Establishment Clause. This is the function of the other components of the “law of the Establishment Clause.” Nonetheless, the development and application of the other components of the “law of the Establishment Clause” are informed by the overriding principle of complete official neutrality toward religion. 105

the world does, the Establishment Clause is an extraordinary protection.” Id. at 379.

However, the principle of complete official neutrality is not breached when, so to speak, “religion tries to persuade government.” Again, as Professor Laycock notes,

Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both. In a democratic society, the state will ultimately decide these questions at least to the extent of deciding what conduct will be subject to legal sanctions. But these are also questions on which churches are absolutely entitled to speak.

Id. at 381.

Therefore, a constitutional objection to a law, such as a prohibition on abortion or sodomy, cannot be made simply because the law is grounded on and serves to implement religious principles. See Bowers v. Hardwick, 478 U.S. 186 (1986); Harris v. McRae, 448 U.S. 297 (1980). In this vein, Professor Marshall has argued that the search for truth is a fundamental value of the religion clauses and, this being so, “there is value in religious ideas similar to that found in nonreligious ideas.” William P. Marshall, Truth and the Religion Clauses, 43 DePaul L. Rev. 243, 266 (1994). As he states, “If there are to be limitations on the role of religion in the public sphere, those restrictions must be based on something other than the substance of religious ideas.” Id. at 267. Likewise, as Professor Garvey notes that not only does the Establishment Clause not forbid “public officials to act on beliefs that [have] religious origins,” “but . . . the Free Exercise clause positively encourages it.” John H. Garvey, The Pope’s Submarine, 30 San Diego L. Rev. 849, 872 (1993). And as most people rely on authority to decide moral questions, “there is no reason to disqualify religious authorities.” Id. at 876. See also, John H. Garvey, A Comment on Religious Convictions and Lawmaking, 84 Mich. L. Rev. 1288 (1986).

105. There has been considerable academic discussion about the meaning of “neutrality.” In an important article on the subject, Professor Douglas Laycock draws a distinction between what he calls “formal neutrality” and “substantive
neutrality." He maintains that "substantive neutrality" is more consistent with religious liberty than "formal neutrality," so that the overriding principle of complete official neutrality toward religion should mean "substantive" rather than "formal" neutrality. See Laycock, supra note 100, at 1011-18. He defines "substantive" neutrality as meaning that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance." *Id.* at 1001. Under "substantive" neutrality, the government may make certain exemptions from laws of general applicability for religious practices, such as the exemption for sacramental wine during Prohibition. (He would say that such an exemption is required by the Free Exercise Clause.) See *id.* at 1003. Laycock criticizes the Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), as being inconsistent with "substantive" neutrality. There the Court held that the state providing remedial instruction for parochial school students in the school itself violated the Establishment Clause because it created an impermissible "symbolic union" between church and state. See *id.* at 414. Laycock says that the result in *Aguilar* is inconsistent with "substantive" neutrality because the state was providing the same remedial instruction to parochial school children as it was providing to public school children, and the effect of the Court's decision was to increase the cost of providing remedial education to parochial school children and so, possibly, to reduce the number of parochial school children receiving the benefit. See Laycock, *supra* note 100, at 1007-8. The Supreme Court has now in effect accepted Professor Laycock's view of substantive neutrality in this context by overruling *Aguilar* in *Agostini* and, in so doing, emphasizing, as Professor Laycock has done, that the state was providing the same remedial instruction to parochial school children as it was providing to public school children. See *Agostini v. Felton*, 117 S. Ct. 1997, 2014 (1997). The Court was also very concerned about the increased cost of providing remedial education for parochial school students and the impact of the increased cost on the children receiving the benefit. See *id.* at 2005-06.

However, even though the result in *Agostini* may see the Court demonstrating a more consistent understanding of "neutrality" as Professor Laycock sees it, in neither *Agostini* nor in *Aguilar* did the Court use the overriding neutrality principle as the analytical basis for deciding the issue before it. Instead, as we have said, the Court relies on the other components of the Establishment Clause to determine whether a particular governmental practice is consistent with this underlying principle. In both cases, the Court was applying the *Lemon* operative principles and specific doctrines, such as symbolic union, that the Court uses to inform its application of those principles. It merely reached a different conclusion in its application of those principles and doctrines in *Agostini* than it did in *Aguilar*. As the Court stated in *Agostini*,

To be sure, the general principles we use to evaluate whether
B. The Operational Principles: The Lemon Test

We now turn to the much-criticized Lemon test. Under the Lemon test, in order for governmental action to be upheld under the Establishment Clause, (1) the action must have a secular legislative purpose, (2) its principal or primary effect may be neither to advance nor inhibit religion, and (3) it may not foster "excessive government entanglement with religion." From the perspective of constitutional litigation, the Lemon test is best understood as comprising three operational principles reflecting "the cumulative criteria developed by the Court over many years." When understood from this perspective, the Lemon test is not a talismanic test or even a comprehensive mode of analysis that by itself can be used to resolve all Establishment Clause issues arising in practice. The Lemon test simply sets forth three operational principles, which serve as a point of departure for Establishment Clause analysis. In Establishment Clause litigation, the application of the Lemon principles (as we shall now refer to them) incorporates the subsidiary doctrines that have emerged from the Court's decisions in the major areas of Establishment Clause litigation. The government aid violates the Establishment Clause have not changed since Aguilar was decided. . . . What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect. Id. at 2010.

Similarly, the exemption for sacramental wine during Prohibition does not violate the Establishment Clause. This is because, as will be discussed subsequently, an exemption from a law of general applicability that is precisely tailored to protect the religious freedom of individuals and religious institutions is not considered to have the effect of advancing religion and so does not violate the Establishment Clause.


108. In every post-Lemon case, save one, the Court has expressly (although
widespread academic dissatisfaction with the *Lemon* test, in my opinion, results from the failure of most academic commentators to understand or accept the limited scope of the test in actual litigation. In litigation the test does nothing more than set forth three operational principles that interact with subsidiary doctrines and precedents to provide the parameters for the resolution of the particular Establishment Clause issue before the Court.\(^\text{109}\)

With some disagreement by particular Justices) applied the *Lemon* test to the resolution of the Establishment Clause issue before it. The sole and glaring exception is *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court employed a strictly historical “framers’ intent” interpretation and concluded that the framers did not intend that the Establishment Clause prohibit legislative prayer. The Court’s aberrational “framers’ intent” interpretation of the Establishment Clause in *Marsh* means that *Marsh* will have little if any extendibility as a precedent. See, e.g., North Carolina Civil Liberties Union Legal Found. v. Constaney, 947 F.2d 1145 (4th Cir. 1991) (distinguishing legislative prayer from courtroom prayer and holding that a judge opening the court with prayer violated the Establishment Clause).

109. One of the few academic commentators who sees utility in the *Lemon* test is Professor Daniel O. Conkle, who states as follows:

Whatever its precise formulation, the essence of *Lemon* is a context-specific inquiry that requires the exercise of judgment. The Court must examine the government’s purpose and the effect of its action, as well as the resulting relationship between religion and government. It must consider the degree to which the government is engaged in favoring or endorsing particular religious beliefs and the degree to which this action might harm religious or irreligious minorities. *Lemon* does not provide a categorical, bright line rule. Through its applications of *Lemon*, of course, the Supreme Court creates precedents that control the resolution of particular questions, thereby giving context-specific guidance to lower courts and to other governmental officials. But *Lemon* itself provides no more than a general standard or “helpful signpost,” for evaluating Establishment Clause challenges.


In a recent article, Professor Kent Greenawalt contends that the Court has now abandoned the *Lemon* test as a “constitutional test,” that is, as a “standard of adjudication that is used by courts to determine whether a practice is constitutional or unconstitutional.” Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 328. Professor Greenawalt goes on to say that courts and lawyers should now,
CONSTITUTIONAL LITIGATION

1. The “Religious Purpose” Principle

Under the “religious purpose” principle, any governmental action taken solely for the purpose of advancing religion is unconstitutional. Whenever the government takes action solely for the purpose of advancing religion, the existence of this improper purpose alone renders the governmental action unconstitutional. Thus in Wallace v. Jaffree, a “moment of silence” law that was found to have been adopted for the purpose of encouraging school prayer was unconstitutional, even though a “moment of silence” law, not found to have been adopted for this purpose, would be constitutionally permissible.

It will be a rare case, however, where the “religious purpose” principle will control the outcome of an Establishment Clause challenge. This is because whenever a governmental action has been undertaken for a religious purpose, it will usually also have the effect of advancing religion, and so will be unconstitutional under the second Lemon principle. Insofar as the “religious purpose” instead, “focus on narrower principles relevant for particular circumstances, drawing these principles partly from the very Supreme Court cases decided under the Lemon test.” Id. at 361. My position is that the Court never applied the Lemon test as a “constitutional test” in the sense that Professor Greenawalt is using that term, and that the results in Establishment Clause cases depended on the Court’s application of the “principles and precedents” of which Professor Greenawalt speaks.

12. See Gary J. Simson, The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach, 72 CORNELL L. REV. 905, 909 (1987). Professor Simson notes that this principle is defensible insofar as it recognizes that a law adopted for a purpose inconsistent with the Establishment Clause should be struck down, even though the law would be unassailable if adopted for valid reasons. See also Ira C. Lupu, Which Old Witch? A Comment on Professor Paulsen’s Lemon Is Dead, 43 CASE W. RES. L. REV. 883, 886 (1993). Professor Lupu says that the principle is nothing more than a particularization of the general obligation that legislation be designed to pursue constitutionally permissible ends.
principle has surfaced in cases other than *Wallace v. Jaffree*, it has been primarily to counter the state’s contention that the challenged governmental action had a religiously neutral effect. From the standpoint of the litigating lawyer mounting an Establishment Clause challenge, there is no utility in undertaking the burdensome task of proving “religious purpose” when the challenge will succeed by making a showing of “religious effect.” In practice then, the first *Lemon* principle will be invoked only in a rare case such as *Wallace v. Jaffree*, where the challenged governmental action, divorced from its “religious purpose,” would not have the constitutionally impermissible effect of “advancing religion.”

2. The “Advancing Religion” Principle

The second *Lemon* principle is that governmental action with the primary effect of advancing or inhibiting religion is

113. Thus, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the historical context of the enactment of the Arkansas anti-evolution law belied the contention that the law had the effect of advancing religiously neutral educational objectives. The Court noted, “It is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.” Id. at 107-08. Likewise, in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the state tried to justify the required posting of the Ten Commandments in public school classrooms on the ground that the Ten Commandments were the basis of the legal code of western civilization and the American common law. The Court rejected this proffered justification as pretextual. In the same vein, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the clear religious purpose behind the enactment of Louisiana’s law requiring that “creation science” be taught along with evolution rendered pretextual the contention that the law had the effect of promoting “academic freedom.”

These cases, along with *Wallace v. Jaffree*, are discussed in Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993). Professor Greene says that these cases stand for the following proposition: “For a law to be upheld against an Establishment Clause challenge, the law’s dominant express purpose must be secular, and any expressly religious purpose for the law must be no more than ancillary and not itself dominant.” Id. at 1624. While this statement is accurate, the fact remains that if the law’s dominant express purpose is secular, but the law has the effect of advancing religion, it will be held unconstitutional under the second *Lemon* “advancing religion” principle.
unconstitutional. Where governmental action has this effect, the
government has, whether it intended to do so or not, violated the
overriding principle that the Establishment Clause commands
complete official neutrality toward religion. The “advancing
religion” principle represents the Court’s value judgment in favor
of an expansive interpretation of the Establishment Clause and to
this extent, may be seen as promoting a “separationist” agenda.

In a number of contexts, the matter of a “purpose” test versus
an “effects” test is of crucial importance in determining the scope of
a particular constitutional provision. For example, the Court has
used an “effects” test to determine the constitutionality of state
regulation and taxation of interstate commerce. By holding that the
negative aspect of the Commerce Clause invalidates state regulatory
and tax laws that have a “discriminatory effect” on interstate
commerce, without regard to a showing of “discriminatory
purpose,” the Court has made negative Commerce Clause
challenges fairly easy to sustain and, in so doing, has gone a long
way in preventing any form of “state protectionism.” On the
other hand, the Court has held that laws that advance a racially
neutral purpose are not subject to constitutional challenge on the
ground that they have a “racially discriminatory” effect. By so
holding, the Court has severely limited the circumstances in which
racial minorities can mount a successful constitutional challenge to
laws and governmental actions that have the foreseeable effect of
disadvantaging racial minorities.

Under the “advancing or inhibiting religion” principle, any
governmental involvement with religion is readily subject to
constitutional challenge on the ground that it has a constitutionally
impermissible “religious” effect. The government’s demonstration
of a secular purpose for its action, which is not at all difficult for

114. See generally Robert A. Sedler, The Negative Commerce Clause as a
Restriction on State Regulation and Taxation: An Analysis in Terms of

115. See Washington v. Davis, 426 U.S. 229 (1976); Robert A. Sedler, The
Constitution and the Consequences of the Social History of Racism, 40 ARK. L. REV.
the government to satisfy, thus becomes completely irrelevant. Stated simply, by adopting an "effects" test for Establishment Clause challenges, the Court has come down strongly on the side of "separation," and this is reflected in the large number of decisions invalidating governmental involvements with religion under the Establishment Clause.

However, the "advancing or inhibiting religion" principle, standing alone, is very difficult to apply in a dispositive way to resolve most Establishment Clause issues. Most governmental involvements with religion have the effect of "advancing or inhibiting religion" to some degree. Some involvements, such as school prayer or bible reading, appear not to have any other significant effect. But many governmental involvements with religion also advance some secular objective as well and, thus, will have a "secular effect" in addition to the "religious effect." The classic example of a "dual effect" is governmental financial aid to parochial schools. Such aid has the effect of "advancing religion" because it supports the religious side of parochial school education. However, it also has the secular effect of "advancing education," as it supports the secular side of parochial school education as well and relieves the public schools from the obligation of educating parochial school children. In this situation, it is not possible to say which effect is "primary." Government financial aid to the parochial schools advances both effects in equal measure.

Because this is so, in applying the "advancing or inhibiting religion" principle, the Court necessarily has had to develop subsidiary doctrines that assist in determining whether a particular governmental involvement has the effect of "advancing or inhibiting religion." The Court's determination is also influenced by the Court's precedents in the different areas of Establishment Clause litigation. While the court expressly applies the "advancing or inhibiting religion" principle in many Establishment Clause cases, in only a limited number of cases will the principle itself be a useful analytical tool in enabling the Court to resolve the particular Establishment Clause issue before it. The result in most of the "advancing or inhibiting religion" cases then will depend on
the Court's application of subsidiary doctrines and relevant precedents to determine whether the particular governmental action has the primary effect of "advancing or inhibiting religion."

3. The "Excessive Entanglement" Principle

Under this principle, governmental action that fosters "excessive entanglement" with religion violates the Establishment Clause. The "excessive entanglement" principle originated in older cases involving controversies between church officials and disputes over church property. In those cases, the Court held that the Establishment Clause precluded the civil courts from becoming involved with matters of religious doctrine or policy, and that the courts must defer to the resolution of those issues by the highest tribunal of a hierarchial church authority. The "excessive entanglement" principle in its current form was articulated and applied by the Court in *Lemon* to hold unconstitutional a state program supplementing the salaries of parochial school teachers of secular subjects. To ensure that the teachers receiving the supplements taught only secular subjects, the state imposed restrictions on the teachers and required the submission of financial data and the examination of school records. The continuing state surveillance of the parochial schools under the program was held to violate the Establishment Clause because it would result in an "excessive and enduring entanglement between state and church."

The result in *Lemon* reflects an interaction between the "advancing or inhibiting religion" principle and the "excessive entanglement" principle. The salary supplement program invalidated on "excessive entanglement" grounds in *Lemon* included the monitoring features in an effort to avoid the invalidation of the program under the "advancing or inhibiting religion" principle.

118. See id. at 619-21.
119. Id. at 619.
Supplementing the salaries of parochial school teachers of secular subjects obviously would have the effect of "advancing religion" unless the state could ensure that these teachers would not include any religious teaching in their classes. However, the monitoring provisions by their very nature rendered the program violative of the "excessive entanglement principle."120

In more recent years, religious organizations have invoked the "excessive entanglement" principle, along with the Free Exercise Clause, to obtain a constitutionally-required exemption from governmental regulation that is claimed to interfere improperly with their religious operations. In this circumstance, the application of the "excessive entanglement" principle seems to focus more on

120. In Walz v. Tax Commission, 397 U.S. 664 (1970), decided the year before Lemon, the Court appeared to apply the "excessive entanglement" principle "in reverse," so to speak, to uphold against Establishment Clause challenge the inclusion of property used for religious purposes in a general property tax exemption for non-profit institutions. The Court noted that the inclusion of property used for religious purposes in the general tax exemption promoted "benevolent neutrality" toward religion and avoided the "entanglement" problems that could result from governmental valuation of church property for tax purposes and enforcement of the tax against church property. See id. at 669. In retrospect, however, it is clear that the basis of the Court's holding in Walz was "benevolent neutrality" rather than "non-entanglement." As will be discussed subsequently, the result in Walz was based on the Court's application of the subsidiary doctrine of the non-discriminatory inclusion of religion. Under this doctrine, the government may, in at least some circumstances, include the religious with the secular in the receipt of governmental benefits; and in Walz, the Court held that this applied to property tax exemptions for non-profit institutions. The "entanglement" that was avoided by exempting church property from the tax would not justify an exemption for church property alone, and this would be unconstitutional as a preference for religion over non-religion. See Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding an exemption from the state sales tax law for religious periodicals alone violative of the Establishment Clause). In other words, the property tax exemption in Walz did not violate the Establishment Clause because it was included in a property tax exemption for all non-profit institutions. The avoidance of "entanglement" problems by the exemption, in retrospect, was not necessary to the decision and would not justify an exemption for church property alone. See also infra notes 268-76 and accompanying text.
the extent of governmental oversight of religious matters, while the free exercise claim seems to focus more on the extent to which the particular regulation interferes with the ability of the religious organization to carry out its religious purpose. In resolving the constitutional question in the particular case, the Court is likely to take both elements into account and to base its decision on both clauses.\(^1\)

C. Subsidiary Doctrines

A number of subsidiary doctrines have emerged from the Court's Establishment Clause decisions over the years. Some of these doctrines, such as "endorsement/symbolic union," have been articulated and expressly applied by the Court. Others, such as "accommodation for religious freedom," represent my explanation of results that the Court has reached in a number of Establishment Clause cases. However derived or explained, these doctrines, which sometimes overlap or interact, are in fact applied by the Court in actual cases, and so comprise an element of the "law of the Establishment Clause." As stated previously, in practice the Court uses these subsidiary doctrines to determine whether or not a particular governmental involvement with religion amounts to "advancing or inhibiting religion," and if so, invalidates the action under that principle.

1. Primary Effect and Incidental Benefit

Where the primary effect of a governmental action is to advance a secular purpose, that action does not violate the Establishment Clause merely because it provides an "incidental benefit" to religion. This subsidiary doctrine relates directly to defining the meaning of the "advancing or inhibiting religion" principle. The crucial question in each case is whether the governmental action effectively advances a secular purpose and provides no more than

121. See infra Part III.D.
an "incidental benefit" to religion. Obviously, whether the governmental action provides no more than an "incidental benefit" to religion is a matter of degree, and the Court must weigh the government's interest in advancing the secular purpose by the means chosen against the resulting "benefit" to religion.

The court articulated this subsidiary doctrine and applied it in the pre-Lemon case of McGowan v. Maryland,122 where it upheld the constitutionality of a state Sunday closing law.123 The court justified the law, regardless of its historic origins, as providing for a uniform day of rest and, therefore, having a secular purpose within the meaning of the first Lemon principle.124 Because the law effectively advanced that secular purpose—the great majority of employees would have Sunday off—the court deemed that the law did not have the effect of "advancing religion," notwithstanding that the choice of that day coincided with the Christian sabbath and therefore provided an "incidental benefit" to religion. The "primary effect and incidental benefit" doctrine also explains why it is constitutionally permissible for the government to include religious institutions as recipients of governmental funding to provide secular services.125 Providing funding to these organizations effectively advances the secular purpose for which the funding is provided, and consequently, any "incidental benefit" for the religious mission of these organizations from the funding is deemed to be tolerable. Finally, this doctrine explains, at least in retrospect, why it is constitutionally permissible for the state to provide certain benefits, such as bus transportation126 and secular textbooks,127 to parochial school students. The provision of bus transportation, for example, advances the secular purpose of getting children to school safely, and because this is so, the Establishment Clause has been held to tolerate this "incidental benefit" to the

123. See id. at 452.
124. See id. at 450.
125. See supra note 101.
parochial schools.\footnote{In Agostini v. Felton, 117 S. Ct. 1997 (1997), the Court focused entirely on the secular purpose of providing remedial instruction for the children attending parochial schools and on the fact that Title I funds could not be used to supplant the remedial instruction and guidance counseling already provided in the parochial schools. \textit{See id. at 2013}; \textit{supra} note 43.}

2. Secular Deism

Proponents of an “accommodationist” interpretation of the Establishment Clause sometimes draw an analogy to the references to God in governmental ceremonies and activities, such as the reference to “One Nation Under God” in the official Pledge of Allegiance; the national motto of “In God We Trust” placed on American currency, official documents, and public buildings; and the traditional opening of federal court sessions with “God Save the United States and this Honorable Court.” They also cite the fact that historically religious holidays such as Thanksgiving and Christmas are celebrated as national holidays. Therefore, they argue by analogy that because these practices assumedly do not violate the Establishment Clause, other governmental involvements with religion, such as a display of a nativity scene on public property, do not violate the Establishment Clause either.\footnote{Chief Justice Burger appeared to be advancing this argument in \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984).}

The definitive answer to this argument by analogy lies in the principle of secular deism. These official references to God and related practices do not violate the Establishment Clause because through long usage in a secular context, they have lost their religious significance.\footnote{See School Dist. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring). Justice Brennan has referred to these practices as having been “interwoven . . . so deeply into the fabric of our civil policy that [their] present use may well not present the type of involvement which the First Amendment prohibits.” \textit{Id. at} 303; \textit{see also} Allegheny County v. ACLU, 492 U.S. 573, 602-03 (1989) (O'Connor, J., concurring) (Justice Blackmun’s discussion of this point); CHOPER, \textit{supra} note 14, at 108-12 (discussing the “American Civil Religion,”}
significance, they do not have the effect of advancing religion and, therefore, do not violate the second Lemon principle. As Justice Douglas noted many years ago, "We are a religious people whose institutions presuppose a Supreme Being." Precisely because this has been so, it should not be surprising that these practices have become a part of official life. For this reason they are now deemed to have a secular meaning and, therefore, are constitutionally unobjectionable. Furthermore, whatever religious significance Thanksgiving and Christmas may retain, it cannot seriously be questioned that they are celebrated by large segments of the public as secular holidays. Thanksgiving is about family reunions, turkey dinners, and football. Christmas is the national holiday of gift-giving. The principle of secular deism means then that these official references to God and the celebration of secular holidays that have a religious origin do not violate the Establishment Clause. It also

referring to "secular political statements that fall within the category of 'widely shared and basically noncontroversial public values').


132. Separationist groups recently brought an Establishment Clause challenge to the use of the national motto, "In God We Trust," and its reproduction on United States currency. See Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), cert. denied, 116 S. Ct. 1830 (1996). The court rejected the challenge stating, "The motto's primary effect is not to advance religion; instead, it is a form of 'ceremonial deism' which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief." Id. at 216. The court also cited two earlier cases where the use of the "In God We Trust" motto on American currency had been upheld against Establishment Clause challenge. See id. (citing O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1978); Arenow v. United States, 432 F.2d 242 (9th Cir. 1970)); see also Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992), cert denied, 508 U.S. 950 (1993) (rejecting the contention that the inclusion of the words "under God" in the Pledge of Allegiance rendered the Pledge an impermissible religious prayer). In his concurring opinion in Schempp, Justice Brennan noted that:

The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same
means that the argument by analogy to support an "accommodationist" interpretation of the Establishment Clause is structurally unsound.

3. Endorsement/Symbolic Union

Under this subsidiary doctrine, governmental action violates the Establishment Clause when it would be perceived by an objective observer as constituting a governmental endorsement of religion or as creating a symbolic union between government and religion. When governmental action would be perceived in this manner, it has the effect of advancing religion and therefore violates the second Lemon principle.

The endorsement/symbolic union doctrine provides a doctrinal explanation of why the display of an unadorned nativity scene on public property is unconstitutional, while the inclusion of a nativity scene as a part of a larger holiday season display is not. The Court found that the former display constituted an endorsement of Christianity while the latter did not. Although there may be considerable disagreement with the soundness of such a distinction (both on and off the Court), the results produced by this distinction illustrate the operation of the endorsement/symbolic union doctrine in practice. The Court also applied this doctrine to hold unconstitutional a grant to churches of a veto over the issuance of a liquor license in proximity to a church.

historical fact.

Schempp, 374 U.S. at 304.
135. See Allegheny County, 492 U.S. at 574; Lynch, 465 U.S. at 668.
136. See Larkin v. Grendel's Den Inc., 459 U.S. 116 (1982). In School District of City of Grand Rapids v. Ball, 473 U.S. 373 (1985), and Aguilar v. Felton, 473 U.S. 402 (1985), the Court concluded that the presence of public school employees in a parochial school classroom amounted to a symbolic union between government and religion. On this basis, it held unconstitutional the use of public school employees to teach secular subjects or to provide remedial
4. Accommodation for Religious Freedom, but Not for Religion

An essential tenet of the "accommodationist" position is that the Establishment Clause should permit some accommodation for religion in public life.\textsuperscript{137} Despite expressions of this view by some Justices in various contexts,\textsuperscript{138} the Court has not upheld services to parochial school students in parochial school classrooms. In \textit{Agostini v. Felton}, 117 S. Ct. 1997 (1997), the Court took the position that the presence of public school employees in a parochial school classroom, without more, does not "create the impression of a 'symbolic union' between church and state," and overruled the holdings in \textit{Ball} and \textit{Aguilar}. See id. at 2016.\textsuperscript{137} This tenet was recently expressed by Ninth Circuit Judge O'Scannlain, reluctantly concurring in \textit{Separation of Church and State Committee v. City of Eugene}, 93 F.3d 617 (9th Cir. 1996), where the Ninth Circuit held unconstitutional a city's display of a large Latin cross.

\textit{[T]he Supreme Court in the last half-century has constructed and zealously policed a "wall of separation" between church and state that was unknown and, indeed, unthinkable at the time of the framing. . . .

Further, the practices that were prevalent and accepted during the early history of this Nation lead to the conclusion that, even as to the national government, the Establishment Clause was not intended to erect a "wall of separation" between church and state. Rather, the accommodation of religion was not only permitted but encouraged. For instance, our national government has, throughout its history, manifested an abiding belief in the value of prayer. \textit{Id. at} 620-22.

Professor Michael W. McConnell has carefully distinguished this view of "accommodation" from an "accommodation for religious freedom," which he strongly advocates.

I must stress at the outset that this Article's conception of accommodation does not include government action that acknowledges or expresses the prevailing religious sentiments of the community such as the display of a religious symbol on public property or the delivery of a prayer at public ceremonial events. Such acknowledgments do not leave the decision about religious practice to the individual or group, but rather serve as a social or collective expression of religious ideas. McConnell, \textit{supra} note 2, at 687.

government action favoring religion on the ground that it reflected a permissible "accommodation" for religion. Thus, in *Estate of Thornton v. Caldor, Inc.*, the Court held unconstitutional a law that entitled an employee to take off work on the day that the employee observed as the Sabbath. The effect of the law was to advance religion because the only employees who could choose a day off were employees who wanted to observe a day as their Sabbath. For the Court to hold that it was constitutionally permissible for the government to make an "accommodation" for religion would be inconsistent with the overriding Establishment Clause principle of complete official neutrality toward religion, as the effect of such an "accommodation" would be to prefer religion over non-religion.

The overriding principle of complete official neutrality toward religion, however, has not been seen by the Court as precluding the government from taking action in some circumstances to protect the religious freedom of individuals and religious institutions. It is here that the Court's interpretation of the Establishment Clause takes account of the Free Exercise Clause and the common purpose of both clauses to secure religious freedom. The doctrine that has emerged from the Court's decisions in this area is that the government may take action that is precisely tailored to protect the religious freedom of individuals and religious institutions. It is for this reason that the Establishment Clause is not violated by Title VII's religious employee exemption for religious institutions, or its requirement that an employer make a reasonable accommodation for an employee's religious beliefs. Likewise, an

140. See id. at 710-11.
141. See id. at 709-10.
143. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); see also infra notes 413-17 and accompanying text. This requirement, however, has been construed very narrowly in order to avoid possible Establishment Clause problems.
exemption from military service limited to those whose opposition to war is based on religious or moral beliefs, as opposed to political beliefs, has been assumed to be consistent with the Establishment Clause.\textsuperscript{144} The same is true of an exemption for sacramental wine during Prohibition, and for the use of peyote in the religious ceremonies of the Native-American church.\textsuperscript{145}

5. The Non-discriminatory Inclusion of Religion

Because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion, the Establishment Clause does not require that the government be hostile to religion. As discussed earlier, this means that the government can include religious institutions in the services it provides to the public generally, such as police and fire protection, can include religious institutions which provide secular services as recipients of governmental funding, and can provide religious organizations with equal access to governmental facilities.\textsuperscript{146} The Court, however, has gone further and has held that, at least in some circumstances, the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits. Under this doctrine, the Court has held that the Establishment Clause is not violated by tax exemptions for religious, charitable, and educational organizations\textsuperscript{147} or by allowing parents to take tax deductions for educational expenses, notwithstanding that most of the deductions will be taken for tuition payments made by parents who are sending their children to parochial schools.\textsuperscript{148} The non-discriminatory inclusion of religion doctrine was also the basis for the Court's holding that it was constitutionally permissible for a blind student to use state payments provided to such students for educational purposes to

\textsuperscript{144} See infra note 418.
\textsuperscript{145} See infra note 425 and accompanying text.
\textsuperscript{146} See supra notes 101-03 and accompanying text.
attend a religiously-affiliated college for the purpose of pursuing a religious vocation.\textsuperscript{149}

It may be possible to identify other subsidiary doctrines from the Court's Establishment Clause decisions, but I think that I have succeeded in identifying the subsidiary doctrines that are most frequently applied in practice. As stated above, in practice these subsidiary doctrines relate primarily to determining whether or not a particular governmental involvement with religion amounts to "advancing or inhibiting religion" and so, is invalid under the second Lemon principle.

\textit{D. The Precedents}

In actual Establishment Clause litigation, lawyers and judges are not likely to approach the Establishment Clause as an undifferentiated whole. Rather they are likely to approach it in terms of different areas of Establishment Clause law and to focus on the applicable \textit{precedents} in each of the different areas. The precedents are more important than the operational principles and subsidiary doctrines, discussed previously, because they are more directly relevant to the analysis of the particular governmental action that is at issue. I have previously discussed this matter in the context of challenges to nativity scene displays on public property and prayers at high school graduation. As I pointed out then, the result in the successful challenge to the display of an unadorned nativity scene on public property in \textit{Allegheny County},\textsuperscript{150} depended on the analysis of the differences between the effect of such a display and the inclusive display that the Court had upheld in \textit{Lynch}.\textsuperscript{151} Likewise, the result in the successful challenge to graduation prayers in \textit{Lee}\textsuperscript{152} depended on the analysis of the

\textsuperscript{149} See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).
\textsuperscript{150} Allegheny County v. ACLU, 492 U.S. 573 (1989).
\textsuperscript{151} Lynch v. Donnelly, 465 U.S. 668 (1984); see supra notes 25-34 and accompanying text.
similarities between graduation prayers and the classroom prayers and other religious practices in the public schools that the Court had invalidated in previous cases.\textsuperscript{153}

The Court’s precedents have been the primary factor in the development of each of the different areas of Establishment Clause law. Nowhere is this phenomenon more evident than in the area of aid to parochial schools. Aid to parochial schools first came before the Court in \textit{Everson v. Board of Education},\textsuperscript{154} which is also the seminal case in the development of the Court’s modern Establishment Clause jurisprudence. At issue in that case was the constitutionality of New Jersey’s policy reimbursing parochial schools for the cost of student bus transportation. A sharply divided Court held, five-four, that the state’s provision of bus transportation for parochial school students did not violate the Establishment Clause.\textsuperscript{155}

In setting forth the “classic meaning” of the Establishment Clause in \textit{Everson}, Justice Black stated that, “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”\textsuperscript{156} However, the Court had held many years before \textit{Everson} that the Establishment Clause was not violated by a governmental grant of funds to a religiously-affiliated institution, such as a hospital, in order to enable it to provide secular services.\textsuperscript{157} It is obvious that in a parochial school there is a complete admixture of the secular and the religious. Parochial schools provide children with instruction in the secular subjects, but they do so from a completely religious perspective, which is why those parents who choose to send their children to parochial schools do so.

To the dissenting Justices in \textit{Everson}, the admixture of the secular with the religious in parochial schools precluded any form

\footnotesize{\textsuperscript{153} See supra note 37 and accompanying text.  
\textsuperscript{154} 330 U.S. 1 (1947).  
\textsuperscript{155} See id. at 18.  
\textsuperscript{156} Id. at 16.  
\textsuperscript{157} See Bradfeld v. Roberts, 175 U.S. 291 (1899).}
of governmental aid to parochial schools because such aid would inevitably advance the schools’ religious function.\textsuperscript{158} The majority did not dispute this point, but avoided its implications by drawing a distinction between aid to the school, which was constitutionally impermissible, and aid to the child, which the majority said was permissible. Because the provision of bus transportation to the parochial school was considered aid to the child and advanced the state’s important interest in securing the child’s safety, the majority concluded that transportation assistance did not violate the Establishment Clause.\textsuperscript{159}

Constitutional law, as previously noted, develops in a line of growth. Under the \textit{Everson} precedent, it would be constitutionally permissible for the state to provide aid to the child, notwithstanding that its provision of such aid would also result in some “incidental” benefit to the parochial school. Taking their cue from \textit{Everson}, some states tried to assist parochial schools in meeting the increasing expenses of education by providing benefits in the form of “aid to the child.” Applying the \textit{Everson} precedent, the Court held that a state could loan parochial school students the same textbooks for secular subjects that it loaned to public school students.\textsuperscript{160} The Court also held that states could provide diagnostic services in which state employees tested individual children for particular health and educational problems in the parochial schools.\textsuperscript{161}

However, the \textit{Everson} precedent precluded the state from providing any form of direct aid to the parochial schools because this would advance the religious purpose of the schools.\textsuperscript{162} Thus,
whenever a state undertook to provide some form of assistance to parochial schools, the analysis of the constitutional issue depended on whether the court characterized the particular form of assistance as "aid to the child" or "aid to the school." Although the Court had held the loan of textbooks as constitutionally permissible "aid to the child," the court held that the loan of instructional materials, such as recording equipment, laboratory, and maps, fell on the side of "aid to the school" and, thus, was constitutionally impermissible. Likewise, although Everson permitted the state to reimburse the schools for bus transportation, this did not extend to transportation for field trips by parochial students. The Everson precedent remains viable, and its effect is to allow state assistance to parochial school education only when the particular form of assistance is held to fall on the side of "aid to the child" rather than "aid to the school."

Now let us consider the impact of a different outcome in Everson on the constitutional permissibility of state assistance to parochial school education. If the views of the dissenting Justices in Everson had prevailed, the state could not provide bus transportation or any assistance at all to parochial school education, notwithstanding that the particular form of assistance might be financial subsidy to the parochial school, enabling it to carry out its religious purpose more effectively.) the supplementation was nonetheless constitutionally impermissible because the program also provided for state monitoring of the teaching of secular subjects in order to ensure that the teaching was free of religious content.

163. See Wolman, 433 U.S. at 248-51.
164. See id. at 252-55.
165. See supra text accompanying notes 44-49; see also Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). In Zobrest, a sharply divided Court held five-four that where a school district provided sign-language interpreters for deaf students in the public schools, the Establishment Clause did not preclude it from providing a sign-language interpreter for a student who transferred to a parochial school. See id. at 13-14. And in Agostini, the Court, again sharply divided, held five-four that remedial instructional programs for low-income students could be provided to parochial school students in parochial school classrooms. See Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997).
characterized as "aid to the child." As a constitutional matter, the issue would be closed. But, the views of the dissenting Justices in Everson fell one vote short of prevailing.

However, if the Court had held aid to parochial schools as being constitutionally permissible, there would have been a very different outcome, with very positive consequences for the parochial schools. Suppose that the Court had focused on the fact that parochial schools perform a secular function by providing children with instruction in the secular subjects. The Court's much earlier precedent had held that the Establishment Clause permits the government to grant funds to a religiously-affiliated institution in order to enable it to provide secular services. Under the rationale of this precedent, the state could, consistent with the Establishment Clause, grant funds to parochial schools to assist them in the secular function of providing children with instruction in the secular subjects. Because there is a complete admixture of the secular and the religious in the parochial schools, the state would be constitutionally required to advance the secular purpose without assisting the parochial schools in advancing their religious purpose. This could be accomplished, consistent with the Establishment Clause, by a reasonable apportionment of funding. The state would grant the parochial schools an amount of funding that was less than the funding of public education, say a 50% reimbursement of per student costs. In other words, for every dollar spent on public school students, the state would be spending fifty cents on parochial school students.

Under this apportionment analysis, the reimbursement of transportation costs in Everson would have been unconstitutional because there was no apportionment. However, the state could revise the funding for bus transportation to accord with a

166. This would not preclude the state from including parochial school students in school lunch programs or immunizations. In this circumstance, the parochial school is merely the conduit for the distribution of a governmental benefit to children, and there would be no question of aid to the parochial school.

reasonable apportionment formula and, more importantly, under this kind of formula, could provide general funding for parochial schools. While the parochial schools prevailed in *Everson*, the result of *Everson* was detrimental to the long-range interests of parochial schools because the rationale of *Everson* renders unconstitutional any general funding for parochial schools and most other forms of parochial school aid. But, if the Court had adopted an apportionment analysis in *Everson*, there would be no constitutional objection to the government providing very substantial aid to parochial schools.168

The Court, however, did not adopt an apportionment analysis in *Everson*. Instead, it held that the Establishment Clause is violated by governmental aid to parochial schools, but is not violated when the government funding takes the form of “aid to the child.”169 As a result of the *Everson* precedent, the constitutionality of every governmental effort to aid parochial school education depends on whether the Court characterizes the particular form of aid as “aid to the child” or “aid to the school.” The end result has been to limit severely the ability of the government to provide aid to parochial school education.

I see Establishment Clause litigation, and thus the Court’s Establishment Clause precedents, as falling into five general areas: (1) religious practices in the public schools; (2) financial aid and governmental benefits to religion; (3) governmental action purportedly “advancing religion”; (4) entanglement and governmental interference in religious matters; and (5) preference for religion or between religions, which includes actions designed to protect the religious freedom of individuals and religious

168. See CHOPER, supra note 14, at 174-86. Professor Jesse Choper argues that because parochial schools perform a secular function, the Establishment Clause policy of prohibiting taxation for religious purposes is not controverted by governmental aid to parochial schools. His position is that the government may generally expend the same amount on parochial school students as it expends on public school students and may apportion the funds allocated to the parochial schools on the basis of time spent on secular subjects. See id.

The discussion of the application of the law of the Establishment Clause in the next part of this Article will be organized into these five areas.

III. THE APPLICATION OF THE LAW OF THE ESTABLISHMENT CLAUSE

This part of the Article will read somewhat like a "restatement." It will discuss the results that the Supreme Court has reached in its application of the law of the Establishment Clause in the five areas of Establishment Clause litigation. The discussion will include some of the more recent lower court cases, primarily those of federal courts of appeals. I hope to demonstrate that most of the major questions arising under the Establishment Clause have now been settled, and that much of Establishment Clause litigation today involves peripheral issues that can be resolved by the application of relevant Supreme Court precedents.

170. Some other commentators have also organized the Establishment Clause cases into different areas. See Marshall, supra note 3, at 540-41. Professor Marshall uses the following three areas: (1) religion in the public schools, (2) governmental practices and regulatory programs, and (3) aid to parochial schools. See id.; see also Matthew S. Steffey, Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy, 75 MARQ. L. REV. 903 (1992) [hereinafter Redefining the Modern Constraints]. Professor Steffey uses the following four areas: (1) classifications that impose burdens or distribute benefits on a religious basis, (2) governmental subsidies of religious activities, (3) limits on religious exhortations by government, and (4) government intrusion into certain central church affairs. See id. at 904-05; see, e.g., Matthew S. Steffey, The Establishment Clause and the Lessons of Context, 26 RUTGERS L.J. 775 (1995). Professor Steffey maintains that when the Court's Establishment Clause decisions are seen as "enforcing four essentially different proscriptions directed at four basically different forms of government behavior, it becomes much easier to focus on underlying principles and themes." Id. at 779.

171. See supra Parts I, II. Some of the Supreme Court cases discussed or referred to in this part of the Article have been discussed in more detail in the first two parts of the Article. They are included again here in order to maintain continuity and to put them in the context of the different areas of Establishment
A. Religious Practices in the Public Schools

The Supreme Court has declared unconstitutional all state-sponsored religious practices in the public schools. These include a released time program in which religious groups sent teachers to provide religious instruction in public school classrooms for students who wished to receive it,\textsuperscript{172} school-sponsored prayers and Bible reading,\textsuperscript{173} the posting of a copy of the Ten Commandments in public school classrooms,\textsuperscript{174} and school-sponsored prayers at a school commencement.\textsuperscript{175} The Court has also declared unconstitutional a state law prohibiting the teaching of evolution in the public schools,\textsuperscript{176} a state law requiring the teaching of "creation science" where the school teaches evolution,\textsuperscript{177} and a state law mandating a moment of silence, which the Court found was adopted for the purpose of encouraging school prayer.\textsuperscript{178} With the exception of the moment of silence case, which was based on the religious purpose element of \textit{Lemon}, all of the cases were based on the advancing or inhibiting religion element of \textit{Lemon}.\textsuperscript{179}

---

\textsuperscript{172} See \textit{McCollum v. Board of Educ.}, 333 U.S. 203 (1948).

\textsuperscript{179} In \textit{Zorach v. Clauson}, 343 U.S. 306 (1952), the Court held that the public schools could "accommodate religion" by providing a "released time" program under which students could leave the school for a specified period of time during the school day to receive religious instruction in non-school facilities. The result in \textit{Zorach} is inconsistent with later-decided cases, such as \textit{Estate of Thornton v. Caldor, Inc.}, 472 U.S. 703 (1985), which hold that the government cannot favor religion over non-religion on the ground that it is making an "accommodation" for religion. The only permissible "accommodation" that the government can make is one that is precisely tailored to protect the religious freedom of individuals and religious institutions. The
The cases involving religious practices in the public schools that have come before the lower courts in recent years have shown a slightly different pattern of results. Some of these cases have involved practices that clearly have the effect of advancing religion, and the courts have held them unconstitutional. These include the distribution of Gideon Bibles to students in the schools, 180 the display of a portrait of Jesus Christ in a public school hallway, 181 and the policy of a school district that had been providing remedial services to Orthodox Jewish children to employ only male drivers on bus routes transporting the children. 182 The Seventh Circuit also has held unconstitutional a state law requiring that the public schools be closed on Good Friday. 183 The court found that the law singled out a religious holiday for special treatment, and rejected the state's proffered secular justifications, such as the law was necessary because large numbers of students would be absent that day or the law was an effort to provide a "spring weekend" for the students. 184

Other cases, however, have seen the courts uphold the particular practice against Establishment Clause challenges. The courts have held that the Establishment Clause does not prevent school choirs from singing religious songs as a part of a secular music program because much of choral music is religious. 185 In addition, while there is much controversy about Christmas

---

180. See Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993).
183. See Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).
184. See id. at 621-24.
185. See Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (holding that there was no Establishment Clause violation in a choir's use of a religious song as its theme song); Bauchman v. West High Sch., 906 F. Supp. 1483 (D. Utah 1995) (holding that there was no Establishment Clause violation in a choir's performing at religious sites as part of its tour).
observances in the public schools, especially the singing of Christmas carols, these observances are likely to be upheld against Establishment Clause challenge. Analogous to the Christmas holiday season display upheld in *Lynch v. Donnelly*, these observances mix the religious with the secular, and are sufficiently secular in overall impact so that they will not have the constitutionally impermissible effect of endorsing religion. Finally, the efforts of objecting parents to relate the public schools' teaching of witchcraft or the schools' celebration of Halloween to "promoting religion" have been unavailing. The courts have not considered witchcraft or Halloween to be "religion" for purposes of the Establishment Clause and so, have rejected the Establishment Clause challenges to these practices.

186. 465 U.S. 668 (1984); see *supra* notes 25-28 and accompanying text.
188. *See* Kunselman v. Western Reserve Local Sch. Dist., 70 F.3d 931 (6th Cir. 1995) (school district's use and display of "Blue Devil" as school mascot); Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (reading series that included readings on wizards and witchcraft); Guyer v. School Bd., 634 So. 2d 806 (Fla. Dist. Ct. App. 1994); cf Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (holding public school course in transcendental meditation to be essentially religious in nature and violative of the Establishment Clause).

Members of traditional religious faiths sometimes contend that by not including religious values in the public school curriculum, the public schools are teaching the "religion of secularism." This contention ignores the difference between the schools teaching "irreligion" and the schools taking a purely secular approach to education. *See also* Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773 (1993). As Professor Ingber has observed:

Regardless of any distinction between the religious and the secular, public schools surely cannot proselytize atheism. Consequently, I contend a further distinction must be drawn between *irreligious secularism*, which is opposed or hostile to religion (defined as a belief system based on the existence of the sacred or divine), and a *nonreligious secularism*, for which the existence of religion is irrelevant. State promotion of irreligious secularism would be unconstitutional; support of nonreligious secularism would not be.

*Id.* at 781-82. In addition, Professor Lupu has stated:
One remaining controverted issue involving religious practices in the public schools has resulted from a Fifth Circuit decision interpreting Lee v. Weisman as permitting nonsectarian prayer at a high school commencement if the decision to have prayer at the commencement was made by the students themselves rather than by the school officials. When the students make the decision, said the court, the saying of prayers would not be perceived as an official endorsement of religion. In a recent en banc nine-four decision, the Third Circuit reached a contrary result, concluding that under Lee, the school’s delegation of an aspect of the ceremony

Parents may choose private religious schooling or public schooling; when they choose the latter, they should feel as safe as possible that no one is condemning their religion or indoctrinating their children in some alternative faith. While it is impossible for children to attend public school in a pluralistic society without some competition from secular norms, and exposure to alternative religious ideas, it is consistent with the constitutional structure for administrators, teachers and courts to minimize the competition between family and state on matters of religious choice.

Lupu, supra note 112, at 898-99.


190. See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992).

The court stated as follows:

The practical result of our decision, viewed in light of Lee, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in high school graduation ceremonies. In Lee, the Court forbade schools from exacting participation in a religious exercise as the price for attending what many consider to be one of life’s most important events. This case requires us to consider why so many people attach importance to graduation ceremonies. If they only seek government’s recognition of student achievement, diplomas suffice. If they only seek God’s recognition, a privately sponsored-baccalaureate will do. But to experience the community’s recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community’s display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different.

Id. at 972.
to a student vote did not constitute an absence of the school officials' control over the graduation, and that regardless of whether the school officials or a majority of the students made the decision, objecting students were no less coerced into participating in the ceremony. At the present time, this issue has not been resolved by the Supreme Court.

This issue is rather peripheral to the matter of religious practices in the public schools, and for this reason, the Fifth Circuit's holding on this issue has little capability for extension and has been limited in the Fifth Circuit itself. In a subsequent case, the Fifth Circuit held that a school district's practice of allowing its employees to supervise and participate in student prayers during basketball games and practice sessions violated the Establishment Clause. More significantly, perhaps, the Fifth Circuit struck

191. See ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996). The court stated as follows:

We find no difference whatsoever between the coercion in Lee and the coercion here.

Here, the hypothetical dissenter in Lee is replaced by 140 students who voted not to have a formal prayer at their high school graduation. Students here either had to either conform to the model of worship commanded by the plurality or absent themselves from graduation and thereby forego one of the most important events in their lives. This is an improper choice to force upon dissenting students.

192. See Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995). In distinguishing Jones, the court stated as follows:

Jones II upheld a school resolution which permitted high school students to choose whether to have a student volunteer deliver a non-sectarian and non-proselytizing invocation and benediction during high school graduation. In concluding that this resolution did not violate the Establishment Clause, we emphasized that high school graduation is a
down as violative of the Establishment Clause a Mississippi statute that authorized “student-initiated voluntary prayer,” not only at commencements but also at all school-related events, such as assemblies and athletic events.\textsuperscript{193} The court found that the statute violated all three of the \textit{Lemon} elements.\textsuperscript{194} It concluded that the evidence showed that the statute was intended to advance religion, and that it had the effect of advancing religion because it gave preferential treatment to religion over other activities.\textsuperscript{195} The court also decided that there was impermissible entanglement because school officials were allowed to lead the students in prayer and would be determining what prayers were permissible.\textsuperscript{196} It is now clear that the only religious practice in the public schools that the Fifth Circuit will uphold as constitutionally permissible is student-initiated non-sectarian prayer at a high school commencement.\textsuperscript{197}

The question of whether or not this practice is constitutionally permissible illustrates the point that most of the unsettled Establishment Clause issues that are likely to arise in the foreseeable


\textsuperscript{194} See id. at 278-80.

\textsuperscript{195} See id. at 279.

\textsuperscript{196} See id.

\textsuperscript{197} The court in \textit{Ingebretsen} specifically declined to reconsider the holding in \textit{Jones}. See \textit{Ingebretsen}, 88 F.3d at 281. A petition for rehearing en banc was denied. In dissenting from the denial of the petition, Judge Jones, who authored the opinion in \textit{Jones}, strongly attacked the Fifth Circuit’s post-\textit{Jones} decisions and barely stopped short of attacking the Supreme Court’s Establishment Clause decisions as well. See id. at 281-88.
future are rather peripheral. A little more than thirty years ago, it had not yet been decided whether school prayers and Bible reading in the classroom were constitutionally permissible. Today, the only unanswered question in regard to school prayer involves student-initiated non-sectarian prayer at a high school commencement.

More significantly, the Supreme Court has declared unconstitutional all state-sponsored religious practices in the public schools. Following Supreme Court precedent, the more recent lower court cases have also declared state involvement with religion in the public schools unconstitutional, except where the particular practice, such as singing religious songs in the school choir or including Christmas carols in Christmas programs, is sufficiently secular in nature that it is not considered to have the effect of advancing religion.198 As Professor Marshall has observed, in the context of religion and the public schools, "[t]he Court’s perspective has been that of the ardent separationist."199

B. Financial Aid and Benefits to Religion

The cases in this area involve the question of whether the government may, consistent with the Establishment Clause, provide financial aid or other benefits of a financial nature to religious institutions or to individuals who use them for a religious purpose. In Everson, Justice Black stated a core meaning of the Establishment Clause: "No tax in any amount, large or small, can

198. See supra notes 185-87 and accompanying text.
199. Marshall, supra note 3, at 541. He agrees with this result and concludes that, "In short, separation in the public schools has become the governing symbol. Any governmental action benefitting religion in the public schools, then, should be upheld only under extraordinarily narrow circumstance." Id. at 541-44; cf. CHOPER, supra note 14, at 140-52. Professor Choper would draw a distinction between practices that are "inherently compulsive" and those that are not. Under Professor Choper’s "inherently compulsive" approach, school prayer and released time programs should be held unconstitutional, but a ban on the teaching of evolution, the required teaching of "creation science" along with evolution, the posting of the Ten Commandments in the classroom, and a moment of silence law designed to encourage prayer would not be. See id.
be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” 200 Professor Jesse Choper has observed, “There is broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many, ‘the most serious infringement upon religious liberty’—is posed by ‘forcing them to pay taxes in support of a religious establishment or religious activities.’ 201 However, it is abundantly clear that every form of financial aid or other benefits of a financial nature provided by the government to “religion” does not violate the Establishment Clause. In Everson itself, the Court held that the state did not violate the Establishment Clause by providing free bus transportation for parochial school students. 202 Justice Douglas’ observation in Zorach that the Establishment Clause “does not say that in every and all respects there shall be a separation of Church and State[,] . . . [but] [r]ather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other,” 203 is a particularly apt description of the constitutional permissibility of governmental financial aid or benefits to religion. Broadly speaking, the constitutional result depends on the purpose for which the financial aid or benefit is given, the particular form that the aid or benefit takes, and on whether, in the circumstances presented, the aid or benefit creates a preference for religion over non-religion. 204 Looking to the

201. CHOPER, supra note 14, at 16 (quoting Paul G. Kauper, Church and State: Cooperative Separatism, 60 MICH. L. REV. 1, 9 (1961)).
204. See, e.g., Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991). This Second Circuit case involved the application of the Establishment Clause to the expenditure of federal foreign aid funds in foreign countries. The federal taxpayers’ suit contended that the Establishment Clause was violated by the use of federal foreign aid funds to support sectarian schools in foreign countries. The Second Circuit held that the Establishment Clause applied to such expenditures, and that once it was determined that the activities of a particular recipient of the funds were pervasively sectarian, the government should “be permitted to
Supreme Court’s precedents in this area, it is helpful to divide the cases into three categories: (1) secular function, (2) aid to religious schools and students, and (3) equal treatment of religion.

1. Secular Function

In 1899, in what appears to be one of the first Establishment Clause cases coming before the Supreme Court, the Court saw no possible Establishment Clause objection to Congress providing funding to a Washington, D.C. charitable hospital that was operated by a religious order.205

The funding was provided pursuant to a contractual arrangement by which the hospital agreed to devote two-thirds of its patient capacity for indigent District of Columbia residents.206 The hospital incidentally had been incorporated by an act of Congress and had its own governing board. Because the hospital essentially operated like any other hospital and performed a secular function, the Establishment Clause was no obstacle to the federal government’s contracting with the hospital in regard to its performance of that secular function.207

Whenever the government provides funding to a religiously-affiliated institution in order to enable that institution to perform a secular function, the funding has a secular purpose (the first Lemon principle) and does not have the effect of advancing religion (the second Lemon principle). Thus, the funding does not violate the Establishment Clause. In Bowen v. Kendrick,208 the Court held that the government could include a religiously-affiliated organization in a program of grants to private organizations to provide counseling for the prevention of adolescent sexual relations demonstrate some compelling reason why the usually unacceptable risk attendant of funding such an institution should, in the particular case, be borne.”

Id. at 842.

206. See id. at 294.
207. See id. at 299-300.
and care for pregnant adolescents and adolescent parents. The grant was challenged on the ground that the organizations would use the grants to advance their religious views on adolescent sexual relations. The Court disagreed, saying that there was no reason to assume that the organizations would not carry out the secular function "in a lawful, secular manner," and that if a particular organization used the grant in an improper manner, the grant could be revoked.

The proposition that the government can provide funding to religiously-affiliated institutions in order to enable them to perform a secular function was relied on by the Supreme Court to uphold federal assistance to church-affiliated colleges and universities. Crucial to this holding was the Court's "constitutional finding of fact" that most church-affiliated colleges and universities are sufficiently similar to secular colleges and universities in their educational operation, so that providing them with governmental

209. See id. at 617.
210. See id. at 611.
211. Id. at 612.
212. See id. at 611-18; see also Ira G. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. PA. L. REV. 555 (1991). Professor Lupu suggests that the holding in this case reflects a doctrine of formal equality which could require that religious institutions be included in governmental aid programs. He states, "So long as government decision makers are not motivated by a covert desire to aid religion qua religion, or to aid a particular religion, religious institutions should be eligible for the same kind and degree of assistance as other institutions serving the same purpose in a nonreligious setting." Id. at 594.

I think that Professor Lupu is reading too much into the Court's holding in Bowen. I see nothing in the Court's opinion to indicate that the neutrality principle requires that religiously-affiliated institutions be included in governmental aid programs. All the case holds is that the decision of the government to include a religiously-affiliated institution in a particular program designed to accomplish secular objectives does not, as such, violate the Establishment Clause. The government could, consistent with the neutrality principle, make the determination that the danger of the funds being used for religious purposes in the particular circumstances is sufficient to justify limiting the funds to secular institutions.
funding will not have the effect of "advancing religion." Nonetheless, the particular funding program involved in these cases did not take the form of a general grant to the institution, but was targeted for specific secular purposes and upheld on that basis.\textsuperscript{213} Where a church-affiliated college or university operates a distinctly sectarian program, such as a divinity school, an unrestricted grant would presumably violate the Establishment Clause because it would have the effect of supporting, to some degree, the institution's sectarian program. And where a particular church-affiliated college or university is found by the court to be a primarily sectarian institution, any governmental aid to that institution, of course, violates the Establishment Clause.\textsuperscript{214}

2. Aid to Religious Schools and Institutions

In \textit{Everson}, the Supreme Court made it clear that the

\textsuperscript{213} See Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (involving grants to defray part of expense of educating students in private colleges and universities, including grants to religiously-affiliated institutions that had given "adequate assurance that funds would be used for a secular purpose"); Hunt v. McNair, 413 U.S. 734 (1973) (involving state-issued revenue bonds that could be used by church-affiliated colleges and universities to borrow funds to finance construction of facilities used for secular purposes); Tilton v. Richardson, 403 U.S. 672 (1971) (involving federal construction grants to church-affiliated colleges and universities for buildings and facilities used exclusively for secular purposes). Because these church-affiliated colleges and universities are considered to be essentially secular institutions, there is no Establishment Clause problem when the government provides financial assistance to students attending such colleges. \textit{See, e.g.}, Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977), aff'd, 434 U.S. 803 (1977); Smith v. Board of Governors, 429 F. Supp. 871 (W.D.N.C. 1977). As indicated by \textit{Witters v. Washington Department of Services for the Blind}, 474 U.S. 481 (1986), an Establishment Clause problem arises only when the financial assistance is provided to a student attending an admittedly sectarian institution. \textit{See generally infra} notes 278-79 and accompanying text.

\textsuperscript{214} See, \textit{e.g.}, Habel v. Industrial Dev. Auth., 400 S.E.2d 516 (Va. 1991) (holding that Jerry Falwell's Liberty University was a sectarian institution so that the city's issuance of construction bonds for educational facilities at the university violated the Establishment Clause).
Establishment Clause prohibits any form of direct governmental financial aid to sectarian elementary and secondary schools, commonly referred to as parochial schools. Unlike most religiously-affiliated colleges and universities, which are primarily secular in operation, in the parochial schools there is a complete admixture of the religious and the secular. While parochial schools provide children with instruction in the secular subjects, they designedly do so from a religious perspective. This is precisely why parents choose to send their children to such schools. Thus, it is not possible for the government to target funds to the parochial schools to be used exclusively for secular purposes, as it can do when it is providing funds for religiously-affiliated colleges and universities. Because of the necessary admixture of the religious and secular in parochial school education, the Court's assumption in Everson was that any form of direct governmental aid to parochial schools would be unconstitutional because this would advance the religious purpose of the schools.

In the earlier discussion of Everson, I suggested that the Court could have taken a very different approach to the constitutional permissibility of governmental financial aid to parochial schools. The Court could have recognized that parochial schools perform a secular function as well as a religious one and, therefore, could have permitted the state to assist the parochial schools in the performance of their secular function by providing them with a reasonable apportionment of state funding. The Court, however, did not adopt such an approach in Everson. Instead, it held that the Establishment Clause is violated when the government provides direct financial aid to the parochial school, but is not violated when the governmental funding takes the form of "aid to the child." While this distinction has been criticized by a number of academic commentators as focusing on the form of the aid rather than on its

216. See id. at 14-16.
217. See supra note 167 and accompanying text.
218. See id.
substance and effect, the distinction has been followed and applied by the Court in determining the constitutional permissibility of governmental aid to parochial schools.

In *Everson*, the Court upheld a state provision of free bus transportation to parochial school students. Applying the *Everson* precedent, the Court has held that a state could loan parochial school students the same textbooks in secular subjects that it loaned to public school students. The Court has also held that the state could provide diagnostic services in which state employees tested individual children for particular health and educational problems in the parochial schools. In the more recent case of *Zobrest v. Catalina Foothills School District*, a sharply divided Court held, five-four, that where a school district provided sign-language interpreters for deaf students in the public schools, the Establishment Clause did not preclude it from providing a sign-language interpreter for a student who transferred to a parochial school. And in its most recent holding, *Agostini v. Felton*, the

---


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


223. See *Wolman v. Walter*, 433 U.S. 229 (1977); see also *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (discussing school lunches). Providing these services to children on an individual basis in the parochial schools is no different from including parochial school students in school lunch programs or immunizations. In this circumstance, the parochial school is merely the conduit for the distribution of a governmental benefit to children.


225. See id. The point that divided the majority and the dissent was whether the presence of the state-provided interpreter in the parochial school classroom created an impermissible symbolic union between government and religion; the majority held that it did not. See id. at 13; see also *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996) (holding that a public school district's provision to a disabled student of an on-site teaching aide and consultant teacher at a parochial school, which it found to be required by the Individuals with Disabilities Education Act, did not violate the Establishment Clause).

Court, again sharply dividing five-four, held that remedial instructional services for low-income students could be provided to parochial school students in parochial school buildings.227

On the other hand, the Court has held unconstitutional virtually every governmental effort to provide direct financial aid to parochial schools, and has invalidated some purportedly "aid to the child" efforts as being, in effect, "aid to the school." This pattern of results begins with Lemon, where the Court held unconstitutional a state program supplementing the salaries of parochial school teachers of secular subjects.228 The Court based its decision on the excessive entanglement principle.229

227. See id. at 2016. It was assumed prior to Agostini that remedial instructional programs for low-income students constituted aid to the child rather than direct aid to the parochial school. In Agostini, the Court majority emphasized that remedial instructional programs, like the provision of a sign-language interpreter in Zobrest, did not impermissibly finance religious indoctrination. Both kinds of programs made aid available only to eligible recipients in the school of their choice, and no funds ever reached the coffers of parochial schools. See id. at 2010-14.

The notion of "aid to the child," of course, is subject to the other constraints of the law of the Establishment Clause, such as the endorsement/symbolic union doctrine. In Aguilar v. Felton, 473 U.S. 402 (1985), the Court held that because of "symbolic union" concerns, the state could not provide remedial programs for parochial school students in the schools themselves. See id. at 412-14. In Agostini, relying on its holding in Zobrest, the Court majority—which was the same in both cases—overruled Aguilar on this point. Agostini, 117 S. Ct. at 2014-16. Also effectively overruled on this point is that part of Meek v. Pittenger, 421 U.S. 349, 370-72 (1975), holding that the state cannot provide therapeutic programs for parochial school students in the schools themselves.

Until Aguilar was overruled by Agostini, these remedial programs were provided off-premises, usually in mobile facilities parked on the parochial school grounds. As the Court noted in Agostini, because this practice was assumed to be constitutional in Aguilar (it was upheld by lower courts, see e.g., Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir.1995)), there could be no claim that the provision of remedial programs for parochial school students amounted to an impermissible subsidy for the parochial schools. See Agostini, 117 S. Ct. at 2014.


229. See id. at 619.
ensure that the teachers receiving the supplements were not including religious with secular instruction, the state imposed restrictions on the teachers and required the submission of financial data and the examination of school records.\(^{230}\) The continuing state surveillance of the parochial schools under the program was held to violate the Establishment Clause because it would result in an "excessive and enduring entanglement between church and state."\(^{231}\)

The Court has also held that the Establishment Clause prohibits the state from paying for the transportation of parochial school students on field trips,\(^{232}\) and from loaning parochial schools instructional materials, such as recording equipment, laboratory materials, and maps.\(^{233}\) Similarly, the state may not grant funds for

\(^{230}\) See id. at 607-08.

\(^{231}\) Id. at 619. The state was in effect caught in a "catch 22" dilemma between the second and third Lemon elements. See also Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools—An Update, 75 CAL. L. REV. 5 (1987). As Professor Choper explains,

The Court began with a critical premise: the mission of church related elementary and secondary schools is to teach religion, and all subjects either are, or carry the potential for being, permeated with religion. Therefore, if the government were to help fund any subjects in these schools, the effect would aid religion unless public officials monitored the situation to see to it that those courses were not infused with religious doctrine. But if public officials did engage in adequate surveillance—this is the other horn of the dilemma—there would be excessive entanglement between government and religion, the image being government spies regularly or periodically sitting in the classes conducted in parochial schools.

Id. at 6.


\(^{233}\) See id.; see also Meek v. Pittenger, 421 U.S. 349 (1975) (holding that the unconstitutionality of such a loan was not obviated by the fact that the state purportedly loaned the materials directly to the students instead of to the schools). But see Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir. 1995). In a two-one decision, the Ninth Circuit took the position that subsequent Supreme Court decisions "have rendered untenable the thin distinction between textbooks and other instructional materials," and that the loaning of instructional materials to parochial schools was now constitutionally permissible. See id. at 1465-70. While agreeing with the majority's conclusion that
the maintenance and repair of parochial school buildings.\textsuperscript{234} All that the Court has permitted by way of direct financial assistance to parochial schools has been reimbursement to the parochial schools for expenses incurred in complying with state law requirements designed to ensure that parochial school students are receiving an adequate secular education, such as expenses incurred in connection with administering state-mandated standardized educational tests and in record-keeping.\textsuperscript{235}

However, in \textit{Agostini}, the Court, overruling its prior decision in \textit{School District of Grand Rapids v. Ball},\textsuperscript{236} in effect retroactively upheld the constitutionality of a "shared time" program under which public school teachers went into the parochial schools and taught certain "enrichment" secular subjects that were designed to supplement the "core curriculum" of the parochial schools. \textit{Agostini} merits additional discussion at this juncture, not only because it is the Court's most recent holding on the constitutional permissibility of aid to parochial schools, but because it is likely to be read too broadly both by proponents and opponents of aid to parochial schools. \textit{Agostini} was a case about \textit{where} secular supplemental and remedial services could be provided to parochial school children.\textsuperscript{237}


\textsuperscript{237} In \textit{Ball}, the Court held that the "shared time" program, while avoiding the entanglement problem of \textit{Lemon}, since only public school teachers were involved and since it clearly advanced the secular purpose of providing instruction in secular subjects, was nonetheless unconstitutional under the second \textit{Lemon} principle in that it had the impermissible effect of advancing religion. \textit{Ball}, 473 U.S. at 397. As the Court in \textit{Agostini} explained it, the Court in \textit{Ball} found this impermissible effect for the following three reasons: (1) the
Precisely because the “shared time” program effectively upheld in Agostini was supplemental to the “core curriculum” of the parochial school, it would fall on the side of “aid to the child” rather than “aid to the parochial school.”

The Court in Agostini specifically found that the program did not impermissibly finance religious indoctrination by subsidizing the primary religious mission of the school. The Court noted, “We have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid.” The Court also noted, looking to Zobrest and Witters, that the benefits in question were made available without regard to the sectarian nature of the school attended and were provided as a teachers participating in the program could become involved in intentionally or inadvertently inculcating particular religious beliefs because the services were dispensed on the parochial schools premises in “an atmosphere dedicated to the advancement of religious belief,” (2) the presence of public school teachers in the parochial school classrooms created a constitutionally impermissible symbolic union between church and state and would convey a message of endorsement of religion, and (3) the program impermissibly financed religious indoctrination by “subsidizing the primary religious mission of the school.” Agostini, 117 S. Ct. at 2008-09. Under this rationale, the Court also invalidated the provision of remedial services to parochial school children in parochial school buildings in Aguilar. See id at 2009-10.

The Court in Agostini took the position that these assumptions of the Court in Ball were undermined by “our more recent cases.” Id. at 2010. Looking especially to Zobrest, the Court said that “we have abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.” Id. Rather, as in Zobrest, it would be assumed, in the absence of evidence to the contrary, that the public employee would faithfully perform his or her duties and would not engage in any religious indoctrination. Similarly, the Court said that Zobrest implicitly rejected the notion “that the presence of a public employee on private school property creates an impermissible ‘symbolic link’ between government and religion.” Id. at 2011. Because the first two assumptions on which Ball rested had been undermined, the decision could no longer be justified on that basis. See id at 2010-12. The third assumption relating to the matter of subsidization is discussed in the text.

result of the independent choice of the individual involved. At this point, the Court turned its attention to the Title I funds for remedial instruction that were directly involved in *Aguilar*. It pointed out that by law, Title I services are supplemental to the regular curricula and that no Title I funds ever reached the "coffers of religious schools." Because the remedial services provided by the program did not supplant the remedial instruction and guidance counseling already provided by the parochial schools, they did not "'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students,'" and did not "'have the effect of advancing religion by creating a financial incentive to undertake" sectarian education. The same rationale would apply to the "supplemental secular instruction" provided under the "shared time" program in *Ball*, and for this reason, the Court overruled the "shared time" holding in *Ball* along with the holding in *Aguilar*.

The effect of *Agostini* then is to allow the state to provide remedial services and "supplemental secular instruction" to parochial school students in the parochial schools themselves. But *Agostini* does not alter in any way the proposition that the government cannot provide direct financial aid to parochial schools. The Court in *Agostini* was very careful to maintain the fundamental *Everson* distinction between constitutionally impermissible direct governmental financial aid to parochial schools and constitutionally permissible aid to the child. While the Court said that government aid is not necessarily unconstitutional merely because it directly aids the *educational function* of religious schools, it emphasized that the aid must be, in substance, aid to the child rather than aid to the school, that the aid must advance a

---

239. See id. at 2011-12.
240. Id. at 2013.
241. Id. (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993)).
242. Id. at 2014.
243. See id. at 2016.
244. See id. at 2011.
clearly secular purpose which is supplemental to the religious purpose of the school, and that the aid cannot be so substantial or of such a nature as to create a significant financial incentive for parents to choose a parochial school education for their children. In regard to the permissibility of aid to religious schools then, the impact of Agostini is fairly limited.

A form of indirect aid to parochial schools involves the state's giving tax benefits to parents who send their children to parochial schools. Presumably, this form of aid reduces the costs of parochial school education and therefore provides a financial incentive for parents to send their children to parochial schools. In Committee for Public Education and Religious Liberty v. Nyquist, the Supreme Court held unconstitutional the state's grant of a tax credit for school tuition paid by parents whose children were attending private or parochial schools. The Supreme Court reasoned that by lowering the cost of parochial school education for these parents, the government was subsidizing parochial school education. The Court held this subsidization to be unconstitutional. However, in Mueller v. Allen, the Court held that there was no violation of the Establishment Clause when the state allowed parents to take a tax deduction for educational expenses, notwithstanding that most of the deductions were taken for parochial school tuition.

Some academic commentators are troubled by the implications of the Mueller decision, especially insofar as it indicated that the Establishment Clause is not violated simply because the tax deduction made it easier for parents to exercise a private choice to

245. See id. at 2014.
246. See id.
248. See id. at 794.
249. See id.
250. See id.
252. See id. at 402.
send their children to parochial schools. There is no doubt that the Court could have held that the tax deduction in Mueller, like the tax credit in Nyquist, violated the Establishment Clause because the practical effect of the deduction was to subsidize parochial school education. However, as this Article will discuss shortly, the Court has consistently held that the Establishment Clause is not necessarily violated by the inclusion of the religious with the secular in the provision of a governmental financial benefit, such as a tax exemption. The facial neutrality of the tax deduction in Mueller enabled the Court to distinguish Nyquist and to bring the case within the scope of its inclusion precedents.

The Court's precedents in the area of financial aid to parochial schools reveal that the state may constitutionally provide certain forms of aid to children attending parochial schools, such as bus transportation to school, the loan of secular textbooks, and remedial and supplemental education services. However, any form of direct financial aid to parochial schools, whether in cash or

253. See Simson, supra note 112. Professor Simson says that the tax deduction has a substantial effect of supporting religion with public funds. Although a tax deduction is not an expenditure of public funds in form, it plainly is so in fact. Moreover, by relieving parents of a tangible part of the cost of educating their children in public schools, this deduction materially increases the likelihood that parents contemplating sending their children to parochial school will decide to do so. Id. at 926; see also Choper, supra note 231, at 9-10. Professor Choper says that Mueller is indistinguishable from Nyquist. In both instances, the state was trying to provide some financial relief to parents who sent their children to private schools, including parochial schools. See id. at 8. He contends that it should not matter that the law in Mueller was facially neutral, while the law in Nyquist expressly favored religion, as the record showed that 96% of the tax deductions under the law were taken for parochial school payments. See id. at 9. He concludes that the decision in Mueller "opened a large window for aid to parochial schools." Id. at 11.

254. See infra notes 268-77 and accompanying text.
255. See Mueller, 463 U.S. at 402.
in kind, has been held unconstitutional, except for reimbursement for services mandated by the state. The state may provide tax benefits for parents of all schoolchildren, notwithstanding that most of the tax benefits are claimed by parents of children attending parochial schools.259

Another area of dispute involves whether school voucher programs are constitutionally permissible. This question has been much discussed by legal commentators and others,260 but at the

259. A useful table, listing the Court’s decisions in this area as of 1985, can be found in John H. Garvey, Another Way of Looking at School Aid, 1985 SUP. CT. REV. 61, 66-67.

Many academic commentators are highly critical of the Court’s decisions in the area of financial aid to parochial schools. See, e.g., Choper, supra note 231, at 6 (“It is fair to say that subsequent decisions [since Lemon] have produced a conceptual disaster area.”). Here Professor Choper criticizes what he sees as the inconsistencies regarding government funding for private schools. See id. He finds incongruities in permitting government funding of bus transportation to the school but not for field trips, in distinguishing between loaning textbooks and loaning instructional materials, and in distinguishing (subsequently eliminated in Agostini) between the provision of remedial services inside the school and off-premises. See id. But see Garvey at 63-92. Professor Garvey sees the Court’s decisions in this area quite differently. Professor Garvey compares the Court’s decisions in this area with the anti-discrimination principle applied by the courts and agencies in the administration of Title IX of the Civil Rights Act, which prohibits sex discrimination in educational programs receiving federal assistance. See id. at 63-65. He concludes as follows:

I have shown that the anti-establishment and anti-discrimination principles in school aid cases are both ultimately concerned with preventing the government from causing improper effects by giving financial assistance to private institutions. The agencies and courts implementing Title IX have developed elaborate and fairly consistent rules for determining how and when such effects occur. Perhaps it should not be surprising that those effects rules work in nearly the same way when applied to the problem of parochial school aid. But it is reassuring, in a way, that the Supreme Court—acting in an ad hoc fashion over a period of nearly 40 years—has worked out an architecture for the Establishment Clause that matches up so well, point for point, with a statutory and regulatory system designed as a coherent whole.

Id. at 92.

260. See generally George W. Dent, Jr., Of God and Caesar: The Free Exercise
present time, and probably for the foreseeable future, it is rather academic. No state has enacted a voucher program, and Congress has made no provision for vouchers in federal education programs. The extent of voucher programs appears to be limited to a few efforts to subsidize the attendance of some low-income children at parochial schools, which have been held unconstitutional in state court challenges.


261. See, e.g., Adam Nagourney, Dole Backs School Choice Through Use of Vouchers, N.Y. TIMES, July 19, 1996, at A8. In the 1996 Presidential election, Republican candidate Bob Dole proposed a $5-billion-a-year federal “school choice” program that would provide vouchers for parents of four million low- and middle-income children that the parents could use to send their children to private or parochial schools. See id.; see generally Saying No to Private Schools at Public Cost, N.Y. TIMES, Aug. 28, 1996, at B6. A recent Phi Delta Kappa/Gallup poll showed that the public rejects 61%-36%, the idea of letting students and their parents choose a private school at public expense, and that 54% of the respondents opposed voucher programs under which the government would pay part or all of the tuition at private and parochial schools. See id.

262. See Kimberly J. McLarin, Ohio Paying Some Tuition for Religious School Students, N.Y. TIMES, Aug. 28, 1996, at B6. Ohio has provided $5.2 million for a two-year pilot program under which up to 2000 low- and moderate-income K-3 children receive state funding to pay tuition at private schools, including parochial ones. Wisconsin has a pilot program for low-income K-12 children in Milwaukee, under which up to 15,000 receive state funding to pay tuition at private schools, including parochial ones. See id.

263. See Simmons-Harris v. Goff, No. 96APE08-982, No. 96APE08-991, 1997 Ohio App. LEXIS 1776, at *1 (Ohio Ct. App. May 1, 1997); State of Wisconsin ex rel Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996). In Simmons-Harris, an Ohio appellate court struck down the Ohio pilot program as violative of both the Establishment Clause and the state constitution religion clause. The court found that the program provided “substantial nonneutral governmental aid directly to sectarian schools,” and that it was irrelevant that the government did so “by passing the aid through the hands of private individuals en route to the sectarian institution.” Simmons-Harris, 1997 Ohio App. 1776, at *26-27. Thompson involved a challenge to the extension of the Milwaukee voucher program to parochial schools. See Thompson, 546 N.W.2d at 142. The lower court had issued a preliminary injunction against the extension. See id. The Wisconsin Supreme Court was divided three-three on the question, so the
There are two basic kinds of proposed voucher programs. This Article will refer to them as the “big voucher” program and the “little voucher” program. Under the “big voucher” program, a state’s elementary and secondary education would be completely restructured to give all parents the “freedom of choice” as to where to send their children to school. The state would give each parent a voucher, for instance worth $5000, which the parent could use for educational purposes. The parent could exchange the voucher for admission to a public school or could use the voucher to pay for or offset the tuition at a private or parochial school. A “little voucher” program would be similar to the programs in Milwaukee and Cleveland. The state would provide money for a limited number of low- and moderate-income children to attend private schools, including parochial schools.264

I submit that under applicable Supreme Court doctrine and precedent, both the “big voucher” program and the “little voucher” program should be held unconstitutional. The “big voucher” program involves a complete restructuring of the system of elementary and secondary education in the state. The government would now be providing substantial financial assistance to the parochial schools, and tax dollars clearly would be used for the benefit of a religious institution. As we have seen, the Court’s precedents preclude any direct form of financial aid to parochial schools, in cash or in kind. The Court has also held some aid programs purportedly taking the form of “aid to the student” unconstitutional. The fact that massive governmental aid would be filtered to the parochial schools by way of a voucher to the parents, and would result from the parents’ “private choice,” does not alter the fact that the government would thereby be providing massive

---

injunction remained in effect. See id. Three judges took the position that the extension violated the state constitution. See id. Three judges took the position that the challengers had not shown beyond a reasonable doubt that the extension violated the state constitution or the Establishment Clause. See id. They based their decision on the fact that the extension, like the original program, was “limited and experimental.” Id. at 142 n.2.

264. See supra note 262.
financial aid to parochial schools. The Establishment Clause forbids this.\textsuperscript{265}

The "little voucher" program suffers from the same constitutional infirmity because the government would, in effect, be paying the tuition at parochial schools for a number of children who otherwise would not be attending parochial schools. There is a clear difference between the government allowing a tax deduction for educational expenses, including tuition at parochial schools as in \textit{Mueller;\textsuperscript{266}} and the government itself paying a student's tuition at a parochial school. Again, the fact that the government's payment of tuition would be the result of the parents' "private choice" does not alter the fact that it is the government that is paying the tuition, thereby providing direct financial aid to the parochial schools. Should the question ever arise, I predict that under existing doctrine and precedents, the courts would hold a "little voucher" program, like a "big voucher" program, unconstitutional.\textsuperscript{267}

\textsuperscript{265.} In \textit{Agostini}, the Court emphasized that under the programs at issue, "no public funds ever reach the coffers of religious schools," and, citing \textit{Zobrest v. Catalina Foothills School District}, 509 U.S. 1 (1993), stated that the services do not "relieve sectarian schools of costs they otherwise would have borne in educating their students." Agostini v. Felton, 117 S. Ct. 1997, 2013 (1997). Finally, the Court stated that the eligibility criteria under the program did not "have the effect of advancing religion by creating a financial incentive for students to undertake sectarian education," or "[c]reate a financial incentive for parents to choose a sectarian school." \textit{Id.} at 2014. This is exactly what voucher programs are designed to do by giving parents a "choice" between public schools and religious schools. Without the financial incentive of vouchers, it is assumed that parents are less likely to make the "choice" in favor of religious schools.


\textsuperscript{267.} See Choper, \textit{supra} note 231, at 13; John H. Garvey, \textit{All Things Being Equal...}, 1996 BYU L. REV. 587, 599. Professor Choper fears that the Supreme Court's decision in \textit{Witters v. Washington Department of Services for the Blind}, 474 U.S. 481 (1986), coupled with the holding in \textit{Mueller}, support the constitutionality of vouchers. See Choper, \textit{supra} note 231, at 13. He appears to be referring to what I have described as a "little voucher" program, although he does not draw that distinction. In \textit{Witters}, the Court held that a blind student, using state payments provided to blind students for educational purposes to attend a sectarian college in order to pursue a religious vocation, did not violate the Establishment Clause. See \textit{Witters}, 474 U.S. at 489. Professor Choper cites the
3. Equal Treatment of Religion

The Supreme Court has held that because the Establishment Clause does not require governmental hostility to religion, including the religious with the secular in the receipt of a

following language in \textit{Mueller}, repeated in the Powell concurring opinion in \textit{Witters}: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the \textit{Lemon v. Kurtzman} test, because any aid to religion results from the private choices of individual beneficiaries." Choper, \textit{supra} note 231, at 13 (quoting \textit{Witters}, 474 U.S. at 490-91). Professor Choper states that this language "clearly describe[s] a situation that includes vouchers: the aid goes to the parents who have children in schools--public, private, and parochial; if the vouchers are cashed at parochial schools, that is the product of private choice." \textit{Id.} Professor Garvey also maintains that as a doctrinal matter, \textit{Witters} settles the constitutionality of vouchers because a voucher program would be neutral in that it "would not influence the direction of people's religious choices." Garvey at 599.

I disagree with Professors Choper's and Garvey's forebodings on this score. \textit{Mueller} involved a tax deduction, and \textit{Witters} involved the "private choice" of a handicapped person to use a state grant to pursue a religious vocation by attending a sectarian college. These are very different from the state subsidizing parochial schools by using state funds to pay tuition at those schools. Because the state cannot constitutionally give direct financial assistance to parochial schools, it cannot use state funds to pay the tuition of children attending those schools, notwithstanding that it does so by the use of vouchers. In the context of state payment of tuition at parochial schools, so-called "private choice" is constitutionally irrelevant. Indeed, as Professor Garvey observed with respect to the deductions upheld in \textit{Mueller}:

One approach to justifying the practice [of deductions for educational expenses] has been to emphasize that (as with Social Security) the benefit to an institution is "ultimately controlled by the private choices of individual parents." That will not work. The government knows exactly what parents will take the deduction \textit{for} (tuition); the only question is \textit{whether} they will take it. The real explanation for these cases is not that the school is not a "recipient" but that tax deductions for contributors--like tax exemptions for the schools--do not count as "financial assistance."

Garvey, \textit{supra} note 259, at 71-72. For the same reason, I submit that \textit{Witters} decision to use his grant to attend a sectarian college does not count as "financial assistance" to the sectarian college.
governmental benefit does not necessarily violate the Establishment Clause. The leading case on this subject is *Walz v. Tax Commission*, 268 where the Court held that a property tax exemption for non-profit institutions, including churches, did not violate the Establishment Clause. 269 The inclusion of church property in the exemption promoted "benevolent neutrality" toward religion 270 and avoided the "entanglement" problems that could result from governmental valuation of church property for tax purposes and enforcement of the tax against church property. 271

Nonetheless, the property tax exemption for church property conferred a very valuable financial benefit on churches, and like any other tax exemption, effectively subsidized the churches' activity. 272 The effect of *Walz* is to allow the state to provide a financial benefit to religion through a tax exemption when it could not provide such a benefit through a direct grant. Crucial to the Court's holding in *Walz* is the matter of inclusion. The tax exemption was for non-profit institutions. Therefore, churches qualified for the grant, not because they were churches, but because they were included within the class of non-profit institutions. As one commentator put it, "those institutions shared a relevant nonreligious attribute with secular institutions." 273 There is no doubt that a property tax

---

269. See id. at 680.
270. See id. at 669, 671-73.
271. See id. at 674-76; see also supra note 120 (noting that the "entanglement" that was avoided by exempting church property from the tax would not justify an exemption for church property alone).
272. See Marshall, supra note 3. Professor Marshall notes that the tax exemption in *Walz* provided a more significant benefit to religion than any other, so that the result is inconsistent with the Establishment Clause objective of prohibiting financial aid to religion. See id. at 500-01; see also CHOPER, supra note 14. Professor Choper also attacks the result in *Walz* as endangering religious liberty because the effect of the exemption is to allow tax funds to be expended for religious purposes. See id at 37.
273. Greene, supra note 113, at 1627. Professor Greene also lists *Everson* as an inclusion case and states as follows:

In both *Everson* and *Walz*, there was no indication that the program was enacted to advance the tenets of a particular religious faith. Rather
exemption for churches alone would violate the Establishment Clause as a preference for religion, notwithstanding that such an exemption would avoid the "entanglement" problems that the Court identified in *Walz*. This point is demonstrated by *Texas Monthly, Inc. v. Bullock*,274 where the Court held unconstitutional an exemption from the state sales tax law for "[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."275 In other words, it is the matter of the inclusion of the religious with the secular that marks the distinction between the constitutionally permissible equal treatment of religion and the constitutionally impermissible preference for religion.276

Because the inclusion of the religious with the secular in the receipt of a governmental benefit does not necessarily violate the Establishment Clause, an Establishment Clause violation would only occur when the inclusion in the particular benefit is inconsistent with a specific Establishment Clause principle or doctrine. In a series of cases, the Supreme Court has held that providing religious groups with equal access to public facilities for purposes of expression does not violate the Establishment Clause.

---

these cases involved general legislative programs that were not related to religion, but that included religious institutions incidentally because those institutions shared a relevant nonreligious attribute with secular institutions.

*Id.*

275. *Id.* at 5 (quoting TEX. TAX CODE ANN. § 151.312 (1982)).

When the government provides no financial support to the nonprofit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion. It aids higher education, health care, or child care; it is neutral to religion.

*Id.*
Such access, standing alone, does not have the effect of advancing religion; it does not create a symbolic union between government and religion, nor does it constitute governmental endorsement of the religious group’s message. At this point, the freedom of expression component of the First Amendment comes into play. Under the First Amendment public forum doctrine, whenever the government designates public property or facilities as a public forum, it must provide all groups equal access to the property for the purpose of expression. Since providing equal access to religious groups for purposes of expression does not violate the Establishment Clause, the government is constitutionally required to provide such access under the First Amendment public forum doctrine.277


For applicable lower court cases see Hsu v. Roslen Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996) (holding that where facilities of public school were available for use by student groups, school could not exclude student Bible club that required its officers to be Christians); Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996), cert. denied, 117 S. Ct. 360 (1996) (holding that where city-owned senior center was designated as a limited public forum, city could not prohibit sectarian instruction and religious worship); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581 (7th Cir. 1995) (holding that where city-county building was opened up for “seasonal displays,” religious seasonal displays, such as a Chanukah menorah, could not be excluded); Fairfax Covenant Church v. Fairfax City Sch. Bd., 17 F.3d 703 (4th Cir. 1994) (holding that school board’s policy of charging religious groups higher rental rates than other non-profit groups for after-school use of school facilities violates the First Amendment); Hawley v. City of Cleveland, 24 F.3d 814 (6th Cir. 1994) (holding that the city’s lease of airport facilities to Catholic Diocese for use as an airport chapel, free of charge, in the same manner as airport facilities
Likewise, in three other cases, the Court has found that the inclusion of the religious with the secular in the particular benefit did not violate the Establishment Clause, even though the effect of the inclusion provided a substantial financial benefit to religious institutions. In *Witters v. Washington Department of Services for the Blind*, the Court unanimously held that the Establishment Clause was not violated when a blind student used state payments, provided to such students for educational purposes, to attend a clearly sectarian college for the purpose of pursuing a religious vocation. In retrospect, as indicated by the unanimous holding, the result in *Witters* is not inconsistent with Establishment Clause doctrine. The program in *Witters* was designed to enable handicapped students to receive an education so that they could acquire marketable skills, and the student in question wanted to pursue a religious vocation. The most logical place for him to acquire the necessary training was at a sectarian college. The state's payment of his tuition at the college advanced the secular purpose of providing this handicapped person with marketable skills, and in this sense, he was treated equally with other handicapped students who received benefits under the program. In these circumstances, the benefit to the student justified the state's payment of his tuition at a sectarian college, which ordinarily the state cannot constitutionally do.

---

are leased to other non-profit organizations, did not violate the Establishment Clause); Good News/Good Sports Club v. Sch. Dist., 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995) (holding that where school district opened school facilities after hours for use by the Scouts and athletic groups, it was required to also open them for use by non-denominational religious group).

In a similar vein, a recent Ninth Circuit case, involving the religious speech of public employees, held unconstitutional a governmental regulation prohibiting "religious advocacy" and the display of religious materials outside employees' cubicles or offices. Because the ban was not necessary to avoid an Establishment Clause violation by the state, the ban violated the First Amendment's content neutrality principle. Tucker v. State of California Dep't of Educ., 97 F.3d 1204 (9th Cir. 1996).


279. See supra notes 260-67 and accompanying text (discussion regarding the
The other two cases, *Mueller v. Allen*\(^\text{280}\) and *Rosenberger v. University of Virginia*,\(^\text{281}\) are more difficult, as evidenced by the fact that they were both five-four decisions. *Mueller* was discussed earlier in connection with aid to parochial schools.\(^\text{282}\) At this point, *Mueller* is relevant because it illustrates how far the Court has carried the inclusion of the religious with the secular in the benefit. The Court had previously held unconstitutional the state’s grant of a tax credit for school tuition paid by parents whose children were attending private or parochial schools.\(^\text{283}\) By lowering the cost of parochial school education for these parents, the government was subsidizing parochial school education, and the Court held this subsidization to be unconstitutional.\(^\text{284}\) The same kind of subsidization for parochial school education resulted when the state allowed parents to take a tax deduction for educational expenses in *Mueller*, as most of the deductions were taken for tuition payments by parents who were sending their children to parochial schools.\(^\text{285}\) A majority of the Court took the position that this was constitutionally irrelevant because the deduction was facially inclusive in that it was available for all educational expenses, and it could be claimed by parents whose children were attending public and non-sectarian private schools. But in reaching this conclusion, the Court had to ignore the fact that in actual operation, the primary effect of the deduction was to benefit parochial school education. If the Court had gone beyond the facial neutrality of the deduction, it would have been compelled to hold that the deduction had the impermissible effect of advancing religion, thereby

---

unconstitutionality of voucher programs).

282. *See supra* text accompanying notes 251-52.
284. *See id.*
285. *See Mueller*, 463 U.S. at 405 (Marshall, J., dissenting). As Justice Marshall pointed out in his dissent, 95% of the 90,000 students who were in private schools were in sectarian schools. *See id.*
violating the second *Lemon* principle.\(^{286}\)

*Mueller* is at the opposite end of the spectrum from *Witters*. In *Witters*, the program benefitted all handicapped students by providing them with training for their vocation. Additionally, the state's payment of the student's tuition at a sectarian college enabled him to obtain the same kind of training for his vocation as secular school students would obtain for their vocation.\(^ {287}\) *Mueller* is also far removed from *Walz* because in *Walz*, the property tax exemption benefitted all non-profit entities, of which churches were only a part.\(^ {288}\) Thus, *Mueller* stands for the proposition that as long as the religious is included with the secular in a benefit program, the program is deemed not to have the effect of advancing religion for constitutional purposes, notwithstanding that it may realistically have this effect in actual operation.\(^ {289}\)

The *Rosenberger* case has been discussed at length previously.\(^ {290}\) In a five-four decision, the Court held that a public university's payment of the printing costs of a religious-oriented student publication, along with the printing costs of other student

\(^{286}\) See generally Choper, *supra* note 231, at 10 (arguing that when the "effect" element of *Lemon* stood in the way of a result that the Court wanted to reach, the Court "simply ignored any realistic application of its doctrine"); Van Alstyne, *supra* note 107, at 909 n.2 (citing *Mueller* as a case where the "*Lemon* test" was not followed at all).


\(^{288}\) See *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (noting that all the other student groups at the university received the benefit).

\(^{289}\) See *supra* notes 260-67 and accompanying text (the rationale of *Mueller* does not authorize voucher programs). *Mueller* was decided in 1983, the same year that the Court decided *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court explicitly--and aberrationally--employed a strict historical analysis to uphold the constitutionality of legislative prayer. See also infra text accompanying notes 342-45. In 1984, the Court decided *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which it upheld the inclusion of a nativity scene in a holiday season display. It would appear that at this point in time, a majority of the Court took a more "accommodationist" view of the Establishment Clause than it had taken both previously and subsequently.

\(^{290}\) See *supra* notes 50-72 and accompanying text.
publications, did not violate the Establishment Clause. This being so, the university’s refusal to pay the printing costs of the religiously-oriented student publication violated the First Amendment’s equal access principle. However, unlike the earlier equal access cases, the claim of the religious group in *Rosenberger* did not involve access to public facilities, but to public funds. The Supreme Court’s Establishment Clause jurisprudence is hostile to the notion that the government can directly provide funding for religious groups to use for religious purposes. In all of the cases discussed above, the governmental benefit program did not involve the direct grant of funds to religious groups. *Walz* involved a tax exemption that included religious groups, *Mueller* involved a tax deduction that was used primarily by parents of children attending parochial schools, and *Witters* involved a tuition payment to a sectarian college for training to a blind student to enable him to pursue his chosen vocation. While some academic commentators contend that the practical effect of a governmental subsidy is no different from that of a direct grant, that distinction has been very important in the Court’s Establishment Clause jurisprudence.

The payment of funds for the printing of the religiously oriented student publication sharply divided the Court in *Rosenberger*. The four dissenting Justices contended that the Establishment Clause prohibited a public university from paying for the printing of a religious message, and that the impermissibility of this form of aid to religion was not obviated by the fact that the university paid for the printing of non-religious messages. This fact also troubled Justice O’Connor, who cast the deciding vote to uphold the constitutional permissibility of the payment. Justice O’Connor stated that this was a hard case because “[it] lies at the intersection of the principle of government neutrality and the

---

291. See supra note 66.
292. See supra notes 268-89 and accompanying text.
293. See *Rosenberger*, 515 U.S. at 876-85.
294. See id. at 876-99.
295. The principle of complete official neutrality toward religion is, as we have said, the overriding principle of the Establishment Clause, and it permits
prohibition on state funding of religious activities." She then took the position that "[w]hen two bedrock principles so conflict," the Court can only resolve the conflict by "draw[ing] lines, sometimes quite fine, based on the particular facts of each case." Here, Justice O'Connor drew the line on the side of the permissibility of the expenditure by emphasizing three facts: (1) the student organization was completely separate from the university; (2) the funds were paid directly to the outside printer and so could only be used for printing the publication; and (3) there could be no perception of governmental endorsement of the publication's religious message, as fifteen other publications were supported by the university in the same manner.

Justice O'Connor's reliance on the fact that the funds could only be used for printing the publication, a point that was also made in the majority opinion, indicates that the Court might have reached a different result if the university had provided a cash grant to all recognized student organizations. Because the cash grant would be a direct payment that could be used by the religious organization for religious activity, a Court majority might conclude that this was too severe a breach of the prohibition on state funding of religious activities. However, it might not. All that can be said is that should this question come before the Court, it will be even harder for the Court to resolve than the question decided in Rosenberger.

We see then that the Court has gone quite far in holding that the inclusion of the religious with the secular in the receipt of a governmental benefit does not necessarily violate the Establishment Clause. Indeed, in all of the cases coming before it, the Court, although sometimes sharply divided, has managed to come up with

---

296. Rosenberger, 515 U.S. at 847.
297. Id.
298. See id. at 848-52.
299. See id. at 842-44.
a majority to hold that providing a particular benefit to the religious as well as the secular was constitutionally permissible. Again, none of the cases have involved a direct grant of financial aid to a religious entity, and this may be the point at which the Court, if ever presented with the question, will draw the line. In the meantime, it can be said that as a general proposition, the Establishment Clause permits the government to include the religious with the secular in the receipt of a governmental benefit.

C. Governmental Action Purportedly Advancing Religion

The cases discussed in this section involve the application of the second Lemon principle, advancing or inhibiting religion, and the subsidiary doctrines implementing that principle. In my analysis of Establishment Clause litigation, there are comparatively few Supreme Court cases in this area. Most of the Supreme Court cases fall into the other areas that I have identified. However, there are a number of recent lower court cases in this area.

An important subsidiary doctrine in this area is that of primary effect and incidental benefit. Where the primary effect of a governmental action is to advance a secular purpose rather than a religious one, that action does not violate the Establishment Clause, although it provides an incidental benefit to religion. This doctrine was articulated and applied in the pre-Lemon case of McGowan v. Maryland, where the Court upheld the constitutionality of state Sunday closing laws against Establishment Clause challenge. Regardless of their historic origins, these laws could be justified as advancing the secular purpose of providing employees with a uniform day of rest. Because these laws effectively advanced this secular purpose, it did not matter that the day chosen coincided with the Christian Sabbath and so provided an "incidental benefit" to religion.

---

301. See id. at 444-45.
302. See id. at 445.
The result reached in the application of this doctrine may depend on whether it is reasonably possible to find a secular purpose for the law in question. This is illustrated by two federal court of appeals cases involving state-mandated Good Friday closings. The Ninth Circuit held that Hawaii's declaration of Good Friday as a state holiday did not violate the Establishment Clause because it had the secular purpose of providing Hawaiians with an additional holiday. Once the court found that the law had this secular purpose, it concluded, in reliance on McGowan, that the law did not have the effect of advancing religion merely because the day chosen for the additional holiday coincided with a day that many state employees would choose to be absent from work for religious reasons. In contrast, the Seventh Circuit held unconstitutional a state law requiring school closures on Good Friday. The court rejected the state's proffered justifications, such as that the law was necessary because large numbers of students would be absent that day or that the law was an effort to provide a "spring weekend" for the students. Because the law was not found to have a clear secular purpose, its singling out a religious holiday for special treatment violated both the first and second Lemon principles.

The Supreme Court's holiday season display cases involve the Court's application of both the primary effect and incidental

303. See Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991).
304. See id. at 775-78.
305. See Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).
306. See id. at 621-23.
307. See id. In the recent case of Granzeier v. Middleton, 955 F. Supp. 741 (E.D. Ky. 1997), the court found that a county's closing of the courthouse on Good Friday, which had been of very-long standing, was intended to be part of a "spring holiday" and so was constitutionally permissible. The case was apparently prompted by a county official posting a sign in April 1996, announcing that the courthouse would be closed that Friday "for observance of Good Friday" and including a picture of a four inch high crucifix with an image of Christ on it. The sign was removed as soon as the suit was brought. The court found that the sign display was unconstitutional and issued an injunction against such displays in the future. The one-time posting of this sign, however, was found not to alter the overall secular purpose and effect of the closure.
benefit doctrine and the endorsement/symbolic union doctrine. In *Lynch v. Donnelly* the Court held, five-four, that the inclusion of a nativity scene in a governmentally-sponsored Christmas holiday season display, containing a Santa Claus, Christmas trees, toy animals, and the other secular symbols of Christmas, did not violate the Establishment Clause. The Burger plurality opinion illustrates the application of the primary effect and incidental benefit doctrine. Burger saw the primary effect of the display to be the celebration of the Christmas season by the display of its traditional symbols, such as a nativity scene. The first part of the Burger opinion seemed to be saying that as long as the symbol used was a traditional one, even if purely religious in nature, the display did not have the primary effect of advancing religion and that any benefit to religion was "incidental." It is clear from the first part of the opinion that Chief Justice Burger and the other Justices who joined in it would have upheld the constitutionality of the display of a nativity scene, standing alone.

The crucial fifth vote to uphold the constitutionality of the display was cast by Justice O'Connor. In her concurring opinion, Justice O'Connor set forth what was subsequently to become the "endorsement" part of the endorsement/symbolic union doctrine. The question for her was whether the display would be perceived by an objective observer as sending a message of endorsement of Christianity. She concluded that the display would not be perceived as sending a message of endorsement because the inclusion of the nativity scene along with all the secular symbols of Christmas did no more than acknowledge the historically religious origin of what had now become a secular holiday. The second part of the Burger opinion likewise emphasizes the fact that the

---

308. 465 U.S. 668 (1984); see supra notes 25-28 and accompanying text.
309. See id. at 671, 685.
310. See id. at 680-81.
311. See id. at 673-78.
312. See supra note 27 and accompanying text.
313. See *Lynch*, 465 U.S. at 687-89.
314. See id. at 692-95.
nativity scene was included as a part of a larger holiday season display and that in that context, it was an acknowledgment of the historical origin of the holiday.\textsuperscript{315}

A reader of the Burger and O'Connor opinions would probably conclude that Burger would vote to uphold the constitutionality of a nativity scene display standing alone, while O'Connor would probably find the unadorned display unconstitutional.\textsuperscript{316} When that question came before the Court in 1989 in \textit{Allegheny County v. American Civil Liberties Union},\textsuperscript{317} O'Connor joined with the four \textit{Lynch} dissenters. The Court held, in another five-four decision, that the display of an unadorned nativity scene would send a message of endorsement of Christianity, thus violating the endorsement/symbolic union doctrine and the advancing or inhibiting religion principle.\textsuperscript{318} However, in line with the holding in \textit{Lynch}, the Court in \textit{Allegheny County} also held that the inclusion of a Chanukah menorah as part of a “salute to liberty” display, next to a large Christmas tree and a “Salute to Liberty” sign, did not send a message of endorsement of Christianity and so was constitutionality permissible.\textsuperscript{319}

The result of the Court’s decisions in \textit{Lynch} and \textit{Allegheny County}...

\textsuperscript{315} See id. at 680-87.

\textsuperscript{316} In \textit{ACLU v. City of Birmingham}, 791 F.2d 1561 (6th Cir. 1986), I argued that the Court’s holding in \textit{Lynch} had to be based on the O’Connor opinion, and that under her “endorsement” test, the display of the nativity scene, standing alone, would be perceived by an objective observer as sending a message of endorsement of Christianity. See supra notes 24-32 and accompanying text.

\textsuperscript{317} 492 U.S. 573 (1989).

\textsuperscript{318} See id. at 616-21.

\textsuperscript{319} See id. at 616-18, 632-37, 663-67. See Marshall, supra note 3, at 514-17. Professor Marshall’s discussion of the Court’s institutional behavior in \textit{Lynch} is equally applicable to the Court’s institutional behavior in \textit{Allegheny County}. See id. He notes that all members of the Court in \textit{Lynch} agreed that some official acknowledgment of religion by the government did not violate the Establishment Clause. Rather, the question was whether the particular form of religious acknowledgment was “within the limits of acceptability.” Id. Professor Marshall also points out that the Burger plurality opinion echoed the Court’s analysis in \textit{McGowan}, while Justice O’Connor in her concurrence and Justice Brennan in his dissent “appeared to characterize the issue in symbolic terms.” Id.
County is to make the determination of the constitutionality of governmental displays of religious symbols very fact-specific. The applicable constitutional doctrine is clear: the display of a particular religious symbol in the circumstances presented cannot convey to an objective observer a message of endorsement of religion. If the display conveys such a message of endorsement, then it has the effect of advancing religion and is unconstitutional. If the display does not convey this message of endorsement, then it does not have the effect of advancing religion and is constitutionally permissible, despite any "incidental benefit" to religion. Precisely because this question is to be resolved by the application of settled legal doctrine and is so fact-specific, it is the kind of question that should be resolved by the lower courts. The Supreme Court probably will not be very disposed to review their decisions.

Taking their cue from the results in Lynch and Allegheny County, the courts are likely to uphold Christmas holiday season displays that contain a nativity scene, so long as the display also includes some of the other secular symbols of Christmas. I was unsuccessful in my efforts to persuade the Sixth Circuit to invalidate a Christmas display that I claimed was "dominated" by a nativity scene, arguing that the addition of some of the secular symbols of Christmas did not alter the message of endorsement of Christianity conveyed by the "dominant" nativity scene. 320 The court rejected the contention, stating that "dominance" was not the test, and that looking to the location of the display and the context of the celebration of Christmas as a national holiday, the display as a whole did not send an impermissible message of endorsement. 321 Likewise, a state supreme court has upheld a "salute to liberty" display that included a nativity scene along with large Christmas trees and a "salute to liberty" sign. 322

320. See Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990).
321. See id. at 248.
322. See King v. Village of Waunakee, 517 N.W.2d 671 (Wis. 1994). However, the Third Circuit has recently held that the addition of some secular figures to an otherwise unconstitutional nativity scene and menorah display on governmental property did not necessarily cure the constitutional violation.
Going beyond holiday season displays, we see that the results in the display of religious symbol cases coming before the lower courts are very fact-specific and are not always consistent with each other. Usually, however, the court has held the particular display to be unconstitutional. The Seventh Circuit has held unconstitutional a war memorial in a public park that took the form of a crucifix. Likewise, the Ninth Circuit found that a display of large and clearly visible Latin crosses in public parks, where they had been used as the background for religious ceremonies, sent a message of endorsement of Christianity and were unconstitutional. The Ninth Circuit also held unconstitutional the display of a large Latin cross in a public park, notwithstanding that the cross had been designated as a war memorial.

ACLU of New Jersey v. Schundler, 104 F.3d 1435 (3d Cir. 1997). The district court had found that adding a Santa Claus, Frosty the Snowman, and a red sled to the display had "sufficiently demystified [and] sufficiently desanctified [the] sacred symbols . . . to escape the confines of the injunctive order in this case." Id. at 1439. The Third Circuit concluded that the district court's notion of "demystification" "cannot form the basis of sound constitutional analysis" and remanded the case with directions to the district court to determine whether the display, as modified, still conveyed a message of endorsement of religion. See id. at 1452.

323. See Gonzales v. North Lake City, 4 F.3d 1412 (7th Cir. 1993).
324. See Ellis v. City of LaMesa, 990 F.2d 1518 (9th Cir. 1993).
325. See Separation of Church and State Comm. v. City of Eugene, Oregon, 93 F.3d 617 (9th Cir. 1996); Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996), cert. denied, 117 S. Ct. 1250 (1997). In Carpenter, a federal district court in California found that the location of the Mount Davidson Cross in a wooded and natural wilderness area, where it could not be seen at night and was only partially visible on a clear day, and its place as an "integral part of the historical and cultural landscape of San Francisco" meant that the city was not "send[ing] an unmistakable message that it supports and promotes the cross' religious message." Carpenter v. City and County of San Francisco, 803 F. Supp. 337, 350 (N.D. Cal. 1992). On appeal, the Ninth Circuit held that the display violated the No Preference Clause of the California Constitution, CAL. CONST. art. I, § 4, which had been interpreted more broadly than the Establishment Clause. See Carpenter, 93 F.3d at 629-32. Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996), involved an Establishment Clause challenge to a city's installation and maintenance of a sculpture representing
In a similar vein, a federal district court has held that displaying a panel containing the Ten Commandments in a county courthouse was unconstitutional, while a sharply divided state supreme court held that the inclusion of a monument containing the Ten Commandments along with other monuments in a state park near the capitol was constitutionally permissible. There have also been conflicting results as to the constitutionality of including a Latin cross in a governmental seal, with the Seventh, Ninth, and Tenth Circuits holding that it is unconstitutional, and the Fifth Circuit finding it constitutional, at least in the particular case.

Other recent lower court cases have dealt with the matter of “advancing religion” in a number of contexts. The Seventh Circuit has held that a nondenominational invocation and benediction offered at a commencement ceremony of a public university, unlike the one offered at a high school graduation in Lee v. Weisman, did not have the primary effect of endorsing religion and so, was constitutionally permissible. The case involved the commencement of Indiana University, which was held in the

---

Quetzalcoatl or the Plumed Serpent of Aztec mythology. See id. at 1225-26. Because the court found that Quetzalcoatl did not have current religious adherents in the United States, the display was not “religious” for Establishment Clause purposes and so was not subject to constitutional challenge. See id. at 1232.


328. See Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995); Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991); City of Rolling Meadows v. Kuhn, 927 F.2d 1401 (7th Cir. 1991); Friedman v. Board of County Comm’rs, 781 F.2d 777 (10th Cir. 1985).

329. See Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991). The case involved the seal of the City of Austin, which was based on the coat of arms of Stephen F. Austin, after whom the city was named. See id. Austin’s coat of arms included a Latin cross, and the Fifth Circuit found that this fact distinguished the Austin seal from a seal that simply contained a cross. See id. at 156-58.


331. Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997).
football stadium and attended by over 30,000 persons. The court noted that many graduating students did not attend the commencement, that most persons seated in the stadium did not stand for the invocation and benediction, and that college students were more mature than high school students and so, less likely to perceive the commencement and benediction as an endorsement of religion.\footnote{332}

A court cannot require a person convicted of driving while intoxicated or another alcohol-related offense to attend meetings of Alcoholics Anonymous as a condition of probation.\footnote{333} While required attendance at Alcoholics Anonymous meetings serves the secular purpose of promoting rehabilitation of alcohol offenders, the Alcoholics Anonymous program is primarily religious in nature, and the government cannot in effect “advance religion” by compelling a person to participate in a religiously-oriented program.\footnote{334} For the same reason, prison authorities cannot require

\begin{itemize}
\item \textit{See id. at} 985-86. In terms of the institutional behavior of courts, the Seventh Circuit’s decision in Tanford seems strikingly similar to the Fifth Circuit’s decision in Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992). \textit{See supra} note 190. Both the Fifth Circuit panel in Jones and the Seventh Circuit panel in Tanford were clearly unsympathetic to the Supreme Court’s holding in Lee v. Weisman and were pleading for a “little bit of religion in public life.” The views of the Jones panel are set forth at \textit{supra} note 190. The Tanford panel emphasized that the university’s practice of having an invocation and benediction at its commencements traced back 155 years and merely had the effect of “solemnizing public occasions rather than approving particular religious beliefs.” \textit{Tanford}, 104 F.3d at 986.

\item \textit{See Warner v. Orange County Dept. of Probation,} 95 F.3d 202 (2d Cir. 1996).

\item \textit{See id. at} 212. The court in Warner cited Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996), a New York Court of Appeals decision which reached a similar result. The Griffin court held that an inmate’s family’s visiting privileges could not be conditioned on participation in a treatment program that adopts the “religious-oriented practices and precepts of Alcoholics Anonymous.” \textit{Id. at} 99. Such required attendance at a religiously-based program would also violate the offender’s free exercise rights. \textit{See also} Doe v. Phillips, 81 F.3d 1204 (2d Cir. 1996). \textit{Doe} involved a rather outrageous violation of establishment and free exercise. The prosecutor, investigating a charge that a mother had sexually abused her son, came to entertain serious doubts about “the reliability of the
inmates to participate in Narcotics Anonymous or other religiously-oriented substance abuse programs. However, the state may include Alcoholics Anonymous as one of a number of authorized self-help programs in which the offender must participate as a condition of probation, as long as it gives the offender the choice of participating in an available self-help program that is not religiously-oriented.

As the latter example indicates, and as with respects to the equal treatment of religion in the receipt of government benefits cases, the inclusion of the religious with the secular in a law or governmental action may defeat the claim that the law or governmental action has the effect of advancing religion. For this reason, a state law that includes the commission of a crime at a place of worship among the aggravating factors for sentencing purposes does not violate the Establishment Clause. Likewise, it is well-settled that a requirement that representatives of religious organizations be included in governmental advisory councils and the like is fully consistent with the Establishment Clause.

accusations." Id. at 1206. The woman's estranged husband, who had urged the son to file the charge, proposed to the prosecutor that the charges be dismissed if the mother, "a member of the congregation of a local Roman Catholic church ... would place her hand on a bible in the [c]hurch and swear that she had not sexually abused her son." Id. at 1207. The prosecutor then communicated the suggestion to the mother's attorney. The mother, who had denied the charges, agreed to the proposal. The swearing ceremony took place in the church, in the presence of the husband, the son who had filed the charge, another son, the woman's mother and sister, and a priest. The prosecutor held the bible and recited the oath that the woman was to repeat. The prosecutor then dismissed the charges. See id. The woman later brought a § 1983 action against the prosecutor. The court rejected the prosecutor's claim of qualified immunity on the ground that "no reasonable official could believe for one moment that forcing an individual to engage in a religious ceremony in a church comports with the First Amendment." Id. at 1212.

337. See Carter v. Peters, 26 F.3d 697 (7th Cir. 1994).
However, a different question is presented when the state delegates law-enforcement authority to a religious organization. A recent decision by a sharply-divided state supreme court illustrates the problem. Here, a state law authorized the attorney-general to commission as police officers the employees of certain public and private institutions, including universities. Pursuant to this law, the attorney-general commissioned as police officers the campus security officers at a sectarian university. The commissioning of these security officers as police officers obviously advances a secular purpose and would not seem to favor religion, as security officers at non-sectarian universities could also be commissioned. Nonetheless, the court majority concluded that the Establishment Clause precluded the state from delegating law enforcement powers to employees of religious institutions.

As these cases—and I have chosen only cases decided in the last few years—indicate, the question of when governmental action purportedly "advancing religion" violates the Establishment Clause arises in a number of contexts. It is in this area especially that the lower courts must apply settled Supreme Court doctrine and precedent to resolve a myriad of questions, and, for the time being at least, they are likely to have the final say on the resolution of those questions.

The analysis of this area of Establishment Clause law concludes with a discussion of the Supreme Court's decision in Marsh v. Chambers. In Marsh, the Court held that the opening of sessions of Congress and other legislative bodies with prayer does not violate the Establishment Clause because this practice was followed by Congress at the time the First Amendment was adopted.

(N.Y. 1992) (state regulations requiring that representatives of religious organizations be included on advisory councils for school AIDS instruction programs).

340. See id. at 276.
341. See id. at 281.
343. See id. at 787-88.
Marsh is the only post-Lemon case where the Court explicitly refused to apply the Lemon principles. If it had, it would have been compelled to declare legislative prayer unconstitutional because it clearly has the effect of advancing religion in the same manner as prayer in school or prayer at a high school commencement. For whatever reason, in Marsh a majority of the Court was persuaded that it should look to historical context and so uphold legislative prayer. Precisely because Marsh was based on historical acceptance of the challenged practice rather than on the "law of the Establishment Clause," and because it is difficult to find any other example of historical acceptance of a religious practice, Marsh is not a precedent that is capable of extension. Thus, when the Fourth Circuit was called upon to determine the constitutionality of judicial prayer in the courtroom, it had no difficulty in limiting Marsh to its precise facts and in invalidating judicial courtroom prayer on the ground that it had the effect of advancing religion. Marsh then stands as an anomaly in the Court’s Establishment Clause jurisprudence, and except for the result in the case itself, it is not a meaningful part of that jurisprudence.

D. Entanglement: Governmental Interference in Religious Matters

The cases discussed in this part of the Article involve the third Lemon principle of excessive entanglement. This principle means first that the civil courts may not become involved with matters of religious doctrine or policy, and must defer to the resolution of these issues by the highest tribunal of a hierarchal church authority. Thus, the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials. Nor may

344. See id. at 791. As discussed previously, supra note 289, in 1983 and 1984 the Court appeared to be taking a more “accommodationist” approach in its Establishment Clause cases.


346. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696
they become involved in disputes between church factions over control of church property, with each group claiming to have the "true faith." Again, the courts must defer to the determination of this matter by the highest tribunal of a hierarchial church organization. However, where the form of church organization is congregational rather than hierarchial, the courts may, consistent with the Establishment Clause, apply general principles of contract and property law to determine which of the contending factions is entitled to the church property.

Second, the excessive entanglement principle may prevent application of general laws to the activities of religious organizations. In this context, the excessive entanglement principle of the Establishment Clause may seem to overlap with the Free Exercise Clause, but there is a very important difference. The application of general laws to the activities of religious organizations would only raise a free exercise concern if that application significantly interfered with the ability of the religious organization to carry out its religious function. Under current free exercise doctrine, that showing seemingly would be very difficult to make, and the Court has, for the most part, rejected the claim of a "free-exercise required exemption" from generally applicable laws. The Establishment Clause concern, in contrast, is that the application of the general law to the activities of the religious organization would "entangle" the government in the determination of religious matters that are more properly the

(1976); Gonzalez v. Roman Catholic Archdiocese, 280 U.S. 1 (1929).


348. See Jones v. Wolf, 443 U.S. 595 (1979). For a recent example of such a case, see Scots African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church, 98 F.3d 78 (3d Cir. 1996). There the Third Circuit emphasized that the courts of New Jersey, whose law governed the dispute, were not concerned about church organization but about whether the courts could resolve the particular question without becoming entangled in questions of religious doctrine or governance. See id. at 94.

349. See infra notes 387 and 413 and accompanying text.
province of the religious organization. For this reason the
Establishment Clause challenge to the application of general laws
to the activities of a religious organization is more likely to be
sustained.

In National Labor Relations Board v. Catholic Bishop of the City
of Chicago, the Supreme Court, invoking the statutory
interpretation principle that where possible a statute will be
interpreted so as to avoid a serious question as to its
constitutionality, held that Congress did not intend that the
National Labor Relations Act apply to the unionization of lay
faculty members at parochial schools. The Court noted that in
Lemon, it had found an "entanglement" between the teaching of the
religious and the secular in parochial schools, and that the Board’s
resolution of unfair labor practices at the schools would, in many
instances, involve an inquiry into the good faith of the position
asserted by clergy-administrators and its relationship to the schools’
"religious mission." Because of these "entanglement" concerns,
the Court concluded that Congress did not intend that the Act
apply to the unionization of lay faculty members at parochial
schools. The Court has also held that Congress did not intend that
non-profit church-affiliated schools be subject to federal
unemployment compensation laws. However, the Court saw no
constitutional problem in applying the federal wages and hours law
to a commercial business operated by a religious organization and
staffed by former drug addicts, derelicts, or criminals before their

351. See id. at 504-07.
352. See id. at 501. The Court also quoted the following language from
Lemon: "The substantial religious character of these church-related schools gives
rise to entangling church-state relationships of the kind the Religion Clauses
sought to avoid." Id. at 503 (quoting Lemon v. Kurtzman, 403 U.S. 602, 616
(1971)).
353. See St. Martin Lutheran Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981). This decision was based primarily on general principles of
statutory interpretation rather than on a concern with avoiding a serious
constitutional question.
conversion and rehabilitation by the foundation. Nor did the Court see any constitutional problem in the application of a state sales and use tax to a religious organization’s sale of religious materials.

Because *Catholic Bishop* was decided on statutory interpretation grounds, it does not serve as a binding precedent with respect to the application of other federal laws to the activities of religious organizations. Likewise, because the Court avoided the constitutional question in that case, it is not a precedent on the question of whether the application of any law to the activities of a religious organization violates the Establishment Clause or the Free Exercise Clause. A number of subsequent lower court cases, however, have dealt with these questions. The posture in which the

354. See *Troy and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985). The foundation was a nonprofit religious organization that operated a number of commercial businesses, including service stations, retail clothing and grocery outlets, roofing and electrical construction companies, a candy company, and a motel. The converted and rehabilitated workers received no cash salaries but were provided with “food, clothing, shelter, and other benefits.” *Id.* at 292. The district court found that these workers were “employees” within the meaning of the federal wages and hours law under the “economic reality” test of employment. See *id.* at 291-92. The Court held that the application of the law to the foundation’s commercial businesses did not implicate the Free Exercise Clause because the required payments in cash to the workers, which they could voluntarily return to the foundation, did not in any way interfere with their religious beliefs. See *id.* at 303. The foundation’s “entanglement” objection to the record keeping requirements of the law was rejected on the ground that the routine and factual inquires required by the law “bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.” *Id.* at 305.

355. See *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990); see also *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989). The Court held that the Internal Revenue Code’s deduction for contributions to charitable and religious institutions did not include fixed fees paid for spiritual auditing and training services because the payments were made in exchange for something of value. The Court noted that disallowing such a deduction avoided Establishment Clause problems because it avoided the necessity for the Internal Revenue Service to decide what services and benefits were religious in nature. See *id.* at 694-98.
case has arisen has influenced the results in these cases. Where it has not been previously determined whether the law is applicable to the activities of a religious organization, the court must first decide the statutory interpretation question. If the court concludes that the law does apply to these activities, the court then has to decide whether the application of the law to the particular activity gives rise to Establishment Clause or free exercise problems. The determination of that question may depend on the effect that the application of the law has on the particular activity. For example, in a case coming before the Minnesota Supreme Court, the question was whether the state labor relations board could exercise jurisdiction over a claim for unionization by lay faculty members at parochial schools. 356 Contrary to the interpretation given to the National Labor Relations Act by the United States Supreme Court in Catholic Bishop, the Minnesota Supreme Court held that the Minnesota Labor Relations Act was intended to apply to the unionization of lay faculty members at parochial schools. 357 Once that question was resolved, the Establishment Clause question was simply whether a state-imposed requirement of collective bargaining, as such, created an “impermissible entanglement” between government and religion. The Minnesota Supreme Court had no difficulty in holding that it did not. 358 The only effect that the requirement had on the operations of the parochial schools, said the court, was that they had a duty to bargain about hours, wages, and working conditions. As the court concluded:

We decline to characterize this minimal responsibility as excessive entanglement. Allowing lay teachers, almost all of whom are Catholic, to bargain collectively will not alter or impinge on the religious character of the school. The first amendment wall of separation between church and state

357. See id. at 861-62.
358. See id. at 863-64.
does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.\textsuperscript{359}

In another post-\textit{Catholic Bishop} case, the Ninth Circuit has held that \textit{Catholic Bishop} was limited to the unionization of teachers at a parochial school, and that the National Labor Relations Act did apply to the unionization of non-faculty personnel, such as childcare workers, cooks, recreation assistants, and maintenance workers at a Catholic school for boys.\textsuperscript{360} The court also found that the exercise of jurisdiction over the unionization of these employees did not violate the Establishment Clause.\textsuperscript{361} Because the duties of these employees were overwhelmingly secular, the Board's exercise of jurisdiction over them would not involve the Board in the school's religious mission, nor would there be any governmental monitoring of the school's religious activities.\textsuperscript{362}

In a similar vein, the Second Circuit has held that the federal \textit{Age Discrimination in Employment Act}\textsuperscript{363} was applicable to age discrimination claims brought by a lay teacher against his parochial

\begin{itemize}
\item \textsuperscript{359} \textit{Id.} at 864. And citing \textit{Employment Division, Department of Human Resources v. Smith}, 494 U.S. 872 (1990), the court held that this "limited governmental regulation of purely secular aspects of a church school's operation," under a generally applicable law, would not violate the Free Exercise Clause. See \textit{id.} at 862; see also \textit{NLRB v. Catholic Bishop}, 440 U.S. 490 (1979). It will be recalled that in \textit{Catholic Bishop}, the Supreme Court saw a possible entanglement problem arising when the Board would be required to resolve a claim that religiously-based action by a parochial school amounted to an unfair labor practice. Should such an issue arise in Minnesota, the Minnesota courts could well hold that in the particular case, the resolution of the claim by the labor board would violate the Establishment Clause. But this possibility did not persuade the Minnesota Supreme Court that the Minnesota legislature intended that the state labor relations law should not apply to the unionization of lay employees at parochial schools. See \textit{Hill-Murray}, 487 N.W.2d at 862.

\item \textsuperscript{360} \textit{See NLRB v. Hanna Boys Ctr.}, 940 F.2d 1295 (9th Cir. 1991).

\item \textsuperscript{361} \textit{See id.} at 1302.

\item \textsuperscript{362} \textit{See id.} at 1303-05. Likewise, there was no free exercise violation because the exercise of jurisdiction over the unionization of these employees would not interfere with the religious aspects of the school's operations. See \textit{id.} at 1305-06.

\item \textsuperscript{363} 29 U.S.C. §§ 621-34 (1994).
\end{itemize}
school employer. In holding that the application of the law to such claims did not violate the Establishment Clause, the court emphasized that the sole question in an age discrimination case was whether an employee had been unjustly discriminated against because of age. No Establishment Clause problem was presented when the parochial school employer asserted that the employee was discharged not because of his age, but for religiously-based reasons. In such a case the court cannot inquire into the plausibility of the religiously-based reasons. The inquiry is limited to the question of whether, in fact, the employee was discharged for the asserted religiously-based reasons or because of his age.

As these cases indicate, the mere fact that a court or governmental agency exercises jurisdiction over employment relations at a parochial school does not necessarily create an entanglement problem. An entanglement problem only arises when the court or agency either applies the law to invalidate an action that was religiously-based or is required to interpret religious doctrine to resolve the particular dispute. Such a situation occurred in a case where a Catholic nun who had been denied tenure in the Canon Law department of the Catholic University of America brought a Title VII sex discrimination claim against the university. The District of Columbia Circuit concluded that the Establishment Clause precluded the civil courts from determining the validity of the claim, both because in so doing they would be required to evaluate the teacher's scholarship and her teaching of religious doctrine, and because the inquiry itself would intrude into the church's ability to make religious judgments about its

364. See DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993).
365. See id. at 166.
366. See id. at 169-70. In this case, the school claimed that the plaintiff was not discharged because of his age, but because he failed to perform his religious duties. The court noted that this involved the determination of a factual question, which could be resolved "without putting into issue the validity or truthfulness of Catholic religious teaching." Id. at 171.
Religious organizations, it may be noted, are not exempt from all the religious discrimination prohibitions of Title VII. Title VII does contain a "religious entity" exemption, under which religious organizations and religious schools may limit employment to persons of their religion. Thus, Title VII applies when a religious organization or school employs persons of a different religion, such as when a Catholic parochial school employs a non-Catholic teacher, or when the basis of the claimed discrimination is not religion but another ground prohibited by Title VII, such as race or gender. However, as the discrimination claim against the Catholic University of America indicates, some applications of Title VII to employment actions by religious organizations may raise Establishment Clause and free exercise problems.

A Third Circuit case involved a Title VII religious discrimination claim brought by a Protestant teacher at a Catholic parochial school whose contract was not renewed because of her remarriage to a man who had been baptized as a Catholic. Under Catholic canon law, the teacher's remarriage was invalid because

368. See id. at 465-66. The court also found that the claim came within Title VII's ministerial exemption and that it was barred by the Free Exercise Clause. See id. at 460-65. The Catholic University of America is a Vatican-chartered university, and the Canon Law department is one of three "ecclesiastical departments" of the university, tenured appointments in which must be approved by the Vatican. See id. at 457. The court noted that it was not possible to evaluate the quality of the teacher's scholarship independently of religious considerations because "there was the inevitable risk that the persons assessing the scholarship of a particular paper would consider whether her conclusions were in accord with what the Church teaches or what, in their judgment, the Church ought to teach." Id. at 466. The court also noted that the trial of her claim "constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution." Id. at 467.


370. See id. The "religious entities" exemption does not violate the Establishment Clause because it is considered to be precisely tailored to protect the religious freedom of religious organizations.

she had been divorced and had not obtained annulment of her prior marriage in the Catholic Church.\textsuperscript{372} The school argued that it would violate the Establishment Clause and the Free Exercise Clause if it was compelled to hire someone, Catholic or non-Catholic, who had entered into a canonically invalid marriage.\textsuperscript{373} The court saw an entanglement problem in that the resolution of the teacher’s claim would involve an inevitable inquiry into the school’s defense that the teacher’s beliefs and practices rendered her unfit to advance the school’s religious mission, and noted that the Establishment Clause and the Free Exercise Clause recognize a church’s interest in managing its own affairs free of government interference.\textsuperscript{374} Because of these serious constitutional questions, the court construed the exemption permitting a religious entity to employ “persons of a particular religion” very broadly to cover conformity with the religious entity’s religious beliefs.\textsuperscript{375}

However, a federal district court in California, observing that the Ninth Circuit construed the “religious entities” exemption narrowly, held that Title VII’s prohibition against pregnancy discrimination applied to a fundamentalist Christian school’s termination of a librarian who had become pregnant by a man to whom she was not married at the time.\textsuperscript{376} The court held that the application of Title VII to this claim would not violate the Establishment Clause because there would be no scrutiny of the school’s religious operations.\textsuperscript{377} If the librarian was fired because of her pregnancy, there would be a violation of Title VII, and that would be the end of the matter.\textsuperscript{378}

\textsuperscript{372} See id. at 945-46.
\textsuperscript{373} See id. at 946.
\textsuperscript{374} See id. at 947-49.
\textsuperscript{375} See id. at 951.
\textsuperscript{377} See id. at 809.
\textsuperscript{378} See id. at 806. The court also found that under current Supreme Court doctrine, there would be no free exercise violation, as the church was subject to a law of general application that advanced a clearly secular purpose. See id. at 809-10.
In my opinion, the application of Title VII to employment decisions of religious organizations presents an Establishment Clause problem only where, as in Catholic University of America, the resolution of the discrimination claim would require the court to engage in a determination of religious doctrine. In the more typical case, where Title VII is invoked to compel a religious organization to employ a person whose behavior is allegedly inconsistent with the organization's religious beliefs, the organization necessarily is asserting that there has been an interference with the organization's religious freedom, and the constitutionality of its claim should be analyzed under the Free Exercise Clause.\textsuperscript{379}

A third application of the excessive entanglement principle precludes the government from protecting religiously-based activity when, in order to do so, it must enforce the requirements of religious law. This application of the excessive entanglement principle has been involved in lower court cases invalidating laws prohibiting the fraudulent sale of kosher food.\textsuperscript{380} Kosher food is food that has been prepared in compliance with the Orthodox Jewish religious rules and dietary laws.\textsuperscript{381} In order to determine whether or not particular food has been prepared in compliance with Orthodox religious rules and dietary laws, government officials must either apply Jewish religious law or delegate the determination to Orthodox Jewish rabbis. Either way, there has been an impermissible entanglement between government and religion. However, consistent with the Establishment Clause, the government could prohibit the fraudulent display of the kosher seal of approval that is placed on food products after they have been certified as kosher by an Orthodox Jewish rabbi. In such a case, the

\textsuperscript{379} A discussion of free exercise limitations on the government's ability to apply employment discrimination law to the employment actions of religious organizations is beyond the scope of this Article.


\textsuperscript{381} See MICHAEL A. FISHBANE, JUDAISM 144 (1987).
court or agency would only have to determine the factual question of whether the product had been certified as kosher by an Orthodox Jewish rabbi. In addition, the law would serve the secular purpose of preventing consumer fraud by the sale of products fraudulently labeled as having the kosher seal.

Our review of the cases in this area indicates that the excessive entanglement principle does not prohibit governmental involvement with religion and does not prohibit the government from regulating the activities of religious organizations. What it prohibits is the kind of governmental involvement with religion or religious organizations that requires the government to make determinations of religious doctrine or to evaluate or enforce religious doctrine. As long as governmental involvement or regulation does not involve the determination or enforcement of religious doctrine, it is not violative of the Establishment Clause.

E. Preference for Religion

Because the overriding principle of the Establishment Clause is that the Establishment Clause commands complete official neutrality toward religion, it necessarily follows that the government cannot favor religion over non-religion, and it cannot favor one religion over another. While cases where the government has acted to favor one religion over another are fairly rare, there have been a number of Supreme Court cases where the

382. See Wallace v. Jaffree, 472 U.S. 38, 60 (1981); see also Everson v. Board of Educ., 300 U.S. 1 (1947). As the Court stated in the classic definition of non-establishment in Everson, "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Id. at 15. It is for this reason that the courts cannot take one or both parents' religion or lack of religion into account in making child custody determinations. See, e.g., Osteraas v. Osteraas, 859 P.2d 948 (Idaho 1993). But cf. Kirchner v. Caughey, 606 A.2d 257 (Md. 1992) (holding that the conflict between divorced parents over religious beliefs was having a detrimental effect on the child so as to justify some restrictions on the non-custodial parent's religious activity with the child).

383. The only Supreme Court case in recent years that falls into this
Court found an Establishment Clause violation because the government was expressly giving preference to religion over non-religion. These cases include the following: a state law providing an exemption from the state sales tax for religious periodicals, a state law that gave churches the power to prevent the issuance of a liquor license to a business that would be located within 500 feet of the church, a state law setting up a special school district embracing the boundaries of a religious community, and a state law entitling an employee to take off work on the day that the employee observed as the Sabbath. In this regard, the Establishment Clause category is *Larson v. Valente*, 456 U.S. 228 (1982), which involved a state law requiring charitable organizations to register, but exempting organizations that received less than half their funds from members. The law was held unconstitutional as applied to the required registration of a religious organization that received more than half of its funds from non-members. See *id.* at 230-32. The "half the funds from non-members" rule was characterized by the Court as creating a preference between religions, and so it violated the Establishment Clause. See *id.* at 255; see also *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298 (Mass. 1996). In *Pielech*, the Massachusetts Supreme Court invalidated the "reasonable accommodation" provision of the state anti-discrimination law, which limited the "accommodation" to practices that would require an individual "to violate or forgo the practice of his creed or religion as required by that creed or religion." *Id.* at 1302. The court found that this "accommodation" preferred employees whose beliefs followed the dogma of an established religion over other employees who held equally sincere religious beliefs. See *id.* at 1303.


386. See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). This case has been discussed supra text accompanying notes 50-54.

387. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The effect of the law was to give a preference for religion, as the only employees who could choose their day off were employees who could say that they observed that day as their Sabbath. See *id.* There was no requirement that their religion precluded them from working on the Sabbath or that they used the Sabbath day for religious purposes. See *id.* I am thus somewhat dismayed at Professor McConnell's characterization of this law as a "Sabbath protection requirement in a law pertaining to work days." McConnell, supra note 2, at 707. The law was in no way precisely tailored to protect the religious freedom of employees whose religion precluded them from working on the Sabbath. See generally *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (discussing the constitutional
CONSTITUTIONAL LITIGATION

1421

does not permit the government to prefer religion over non-religion on the ground that, by so doing, the government is making an "accommodation" for religion. Stated simply, precisely because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion, the Establishment Clause does not permit any "accommodation" for religion.388

However, while the Establishment Clause precludes the government from giving any preference to religion over non-religion, the overriding principle of complete official neutrality toward religion also means that the government is not required to be hostile to religion. This being so, the inclusion of the religious with the secular in the receipt of governmental benefits does not necessarily violate the Establishment Clause, and the Court has gone quite far in upholding the constitutionality of such inclusions.389 Thus, some of the preferences for religion that the Court has found unconstitutional could have been sustained if the benefit involved had also been provided to similarly situated non-religious groups.390 A state can provide a sales tax exemption for all non-profit periodicals, including religious ones. Zoning laws frequently prohibit the location of businesses serving liquor near residences, churches, schools, and similar uses. If a state wants to enable employees to take off work on the day that the employee observes as the Sabbath, it can do so by giving all employees the right to choose a day off from work. Again, what the Establishment Clause prohibits is a preference for religion over

permissibility of a Sabbath observance law limited in this manner); infra text accompanying notes 413-17.

388. See supra note 179. But see Zorach v. Clauson, 343 U.S. 306 (1952). The released time program, justified as an "accommodation," was actually a preference for religion because released time was limited to out-of-school religious study, and the program was not designed to protect the "religious freedom" of the participants. See id. at 309-12.

389. See supra Part III.B.3.

non-religion. It does not, as such, prohibit the government from including the religious with the secular in the receipt of governmental benefits.391

A different question is presented when the government takes action that is precisely tailored to protect the religious freedom of individuals and religious institutions. While some academic commentators have contended that the Establishment Clause precludes the government from preferring religious freedom over other forms of freedom,392 the Supreme Court has not taken this

391. See generally supra notes 231-35 and accompanying text. Other components of the “law of the Establishment Clause,” however, may prohibit such inclusion in particular circumstances. The prohibition on direct financial aid to parochial schools, for example, precludes the government from paying the tuition for parochial school students, notwithstanding that the government provides free public education for public school students. It likewise has been held to prohibit the loan of maps and instructional materials to parochial school students, although these materials are loaned to public school students. 392. See Lupu, supra note 212; William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 CASE W. RES. L. REV. 357 (1989-90); Sherry, supra note 10; Simson, supra note 112.

In arguing against a constitutionally-compelled exemption for religiously-based conduct under the Free Exercise Clause, Professor William P. Marshall notes that “the free exercise claim for constitutionally compelled exemptions leads to a First Amendment jurisprudence that simultaneously calls for special deference to religion under the Free Exercise Clause and a prohibition of special deference under the Establishment Clause.” (citations omitted). Marshall at 358-59. Professor Marshall concludes,

By preferring religious belief systems over all others, including philosophical, moral and political belief systems, this exemption offends the equality-of-ideas notion that is at the core of constitutional law. For this reason alone, the argument for constitutionally compelled free exercise exemptions should be rejected. Rejecting constitutionally favored treatment for religion will assure that one type of belief system is not artificially and unalterably fortified to the detriment of another. Id. at 411-12.

Professor Ira G. Lupu attacks efforts by the government to respond affirmatively to religion-based claims for exceptional treatment that would not be afforded but for the religious quality of the claims or the religious character of the institution advancing the claims, and that are not constitutionally required by the Free Exercise Clause. When the government does this, says Lupu, “it is
position. This is because the Establishment Clause and the Free Exercise Clause operate in tandem, and the objective of the religion

privileging religious claims in ways likely to offend constitutional norms and to reflect poor statecraft.” Lupu, supra note 212, at 560. He further contends that any accommodation for religion-based claims is inconsistent with the principle of equal religious liberty. “In a regime of equal liberty, the state must treat all approaches to religion with equal respect.” Id. at 567. In this vein, he concludes as follows:

If [special treatment on the basis of religion] is designed to remedy a pre-existing violation of the Free Exercise Clause or to avoid what would be a violation of that clause, it is constitutionally appropriate. If there is no such predicate, the same action violates norms of religious equality and is impermissible. . . . Free exercise rights trump Establishment Clause limits, but free exercise “values” do not, because of the impact on religious equality and the religious liberty of others that would be the result of such a general favoring of free exercise interests.

Id. at 575-76.

To the same effect, Simson states, “It singles out for favored treatment religiously motivated actions from among those that employees may feel compelled to take and that employers may pressure them not to take. It implicitly states that religious motivations count for more than nonreligious ones and that religion is preferable to nonreligion.” Simson, supra note 112, at 914.

Professor Suzanna Sherry goes so far as to contend that religiously-based exemptions, even those that the Court has found to be required by the Free Exercise Clause, are inconsistent with Establishment Clause doctrine because they amount to a preference for religion.

[A]n effect—arguably the primary effect—of mandating such exemptions only for those with religious claims is to advance religion, at least in the sense of encouraging or enabling adherents to practice their religion while denying to others the right to live by their own philosophical principles. Thus people are encouraged to base their lives on religious as opposed to non-religious principles.

Sherry, supra note 10, at 127. Likewise, she contends that

[w]henever government attempts to remedy a de facto discrimination against religion by granting an exemption to religious objectors it creates an equally noxious de jure discrimination against nonbelievers. For the government to grant only religious exemptions sends a message that religious belief is valued more than nonbelief . . . and encourages religious belief.

Id. at 142-43.
clause, taken together, is to promote religious freedom. Religious freedom is thus a favored constitutional value, and it would be inconsistent with the overriding purpose of the religion clauses, taken together, for the Court to hold that the Establishment Clause necessarily precludes the government from acting to protect the religious freedom of individuals and religious institutions.393 The constitutional distinction then is between governmental action that has the purpose and effect of favoring religion over non-religion, which is unconstitutional, and governmental action that has the purpose and effect of protecting the religious freedom of individuals and religious institutions, which may be constitutionally permissible.394

393. See McConnell, supra note 2, at 718. As Professor Michael W. McConnell has noted,

In the context of their purposes and intellectual history, the Religion Clauses are complementary provisions guarding against two equal and opposite threats to the autonomy of religious life. The Establishment Clause guarantees that the federal (and after incorporation, state and local) government will not give official status or preference to any religion or religions, and the Free Exercise Clause guarantees that it will not interfere (without sufficient justification) with the beliefs and practices of any religion. In other words, decisions about whether and what religious practices to engage in will be left to individual citizens and their churches.

Id.

394. A number of academic commentators have strongly advocated the proposition that the Establishment Clause permits the government to take action to “accommodate” religious freedom. Foremost among them is Professor Michael W. McConnell. Professor McConnell states,

Accommodation refers to government laws or policies that have the purpose and effect of removing a burden on or facilitating the exercise of a person’s or an institution’s religion. The key difference between legitimate accommodation and impermissible “establishment” is that the former merely removes obstacles to the exercise of a religious conviction adopted for purposes independent of the government’s action, while the latter creates an incentive or an inducement (in the strong form a compulsion) to adopt that practice or conviction.

McConnell, supra note 2, at 686. Professor McConnell notes that the issue of accommodation arises both under the Free Exercise Clause and the
In order for the governmental action to be constitutionally permissible, it must be shown to be precisely tailored to protect the religious freedom of individuals or religious institutions. First, the action must be directed toward obviating an interference with religious freedom. An interference with an individual's religious freedom occurs when the individual is prevented from doing something that his religion requires, such as a member of the Native-American church being prohibited from using peyote in a religious ceremony,\(^3\) or where someone is compelled to do something that the religion prohibits, such as a Sabbatarian being

Establishment Clause, and that while the Court's current position is that accommodations are not generally required under the Free Exercise Clause, they are permissible under the Establishment Clause. See id. at 687. He defends accommodations as a "commonsensical way to deal with the differing needs and beliefs of the various faiths in a pluralistic nation." Id. at 694; see also Greene, supra note 113; Gary C. Leedes, Court-Ordered Exemptions to Secure Religious Liberties, 21 U. RICH. L. REV. 335 (1987); Steffey, Redefining the Modern Constraints, supra note 170.

Greene asserts,

A legislative exemption for religion is not necessarily an affirmation of the truth of the religious faith involved. Rather, the exemption might be based on the secular ground of respect for the dilemma that would be faced by certain members of the community were they forced to choose between obeying the commands of law and obeying those of a separate font of authority. In short, the exemption might be enacted not because of religious faith but because of toleration for a belief that happens to be based on faith.

Greene, supra note 113, at 1625-26. Leedes states that even when laws appear to treat everyone alike, each unique individual's integrity as a moral actor is threatened if the law compels him to disavow his religious scruples. It is not necessarily an establishment of religion when a particular individual's religious needs are accommodated. It is often unjust, unfair, and cruel to punish persons who sincerely believe in the necessity of their act.

Leedes at 357-58. According to Steffey, "In practice, however, the Court has found only one justification [for a nonsectarian religious classification] acceptable: removal of a barrier to religious exercise or a burden on religious practice." Steffey, Redefining the Modern Constraints, supra note 170, at 911.

395. See infra note 425 and accompanying text.
required to work on Saturday. An interference with the freedom of a religious institution occurs when the law prevents the institution from carrying out its religious function, such as a law prohibiting the institution from employing members of its religion in the religious activities of that institution.

Regarding the permissibility of government action to protect the religious freedom of individuals and religious institutions, it is irrelevant whether the interference with religious freedom amounts to a Free Exercise Clause violation. Of course, where the Court has concluded that the interference does amount to a Free Exercise Clause violation, the Court necessarily determines that the resulting exemption from an otherwise applicable law does not amount to an unconstitutional preference for religion. Sherbert v. Verner and related cases illustrate this point. In Sherbert, the Court held that a denial of unemployment compensation to a Sabbatarian who refused Saturday work and to a person who, on religious grounds, refused to work in weapons production violated the Free Exercise Clause. Precisely because this denial of unemployment compensation violated the Free Exercise Clause, the free exercise-required exemption did not amount to an unconstitutional preference for religion.

396. See infra notes 398-403 and accompanying text. 397. See Simson, supra note 112, at 913. Professor Simson has noted, As the Court regularly has assumed, the establishment and free exercise clauses are most sensibly interpreted as coexisting with one another: One clause does not require what the other forbids. Under this view of the relationship between the two clauses—a view virtually compelled by their juxtaposition and common roots—a purpose of complying with the Free Exercise Clause cannot reasonably be found to be incompatible with the Establishment Clause. Instead, it stands apart from the types of purposes prohibited by the Establishment Clause as a distinct variety of purpose permissible under the clause.

Concern about a possible unconstitutional preference for religion in this circumstance was necessarily subsumed in the Court's analysis of the free exercise claim, and the Court came down on the side of the free exercise claim. 402

Most interferences with religious freedom, however, are not violative of the Free Exercise Clause. 403 But the government's power to take action to protect the religious freedom of individuals and religious institutions is not circumscribed by the Free Exercise Clause. 404 Rather, the government may take such action unless

401. See id. at 409-10.
402. See id. at 410. As the Court stated in Sherbert,

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental 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. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties.

Id. at 409 (citations omitted).

403. In some cases, a private entity may have caused the interference, such as where a private employer requires a Sabbatarian to work on that person's Sabbath. More significantly, the Supreme Court's recent free exercise jurisprudence, especially the holding in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), indicates that relatively few interferences with religious freedom will violate the Free Exercise Clause. There the Court held that the Free Exercise Clause does not require that the government exempt religiously-based conduct from neutral and generally applicable criminal laws. See id. at 876-82.

404. See McConnell, supra note 2, at 708-12. Professor McConnell quotes Justice Brennan's observation in Texas Monthly v. Bullock, 489 U.S. 1, 18 n.8 (1989), to the effect that, “[W]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.” McConnell, supra note 2, at 708-09. Further, “[t]his repudiates the position, sometimes found in the literature, that the political branches have no discretion to institute accommodations that are not constitutionally compelled by the Free Exercise Clause.” Id. at 709 (footnote
precluded from doing so by the Establishment Clause. The cases hold that the government is not precluded from doing so by the Establishment Clause as long as it does so in a manner that is precisely tailored to protect the religious freedom of individuals and religious institutions. If the governmental action satisfies this requirement, it does not constitute a preference for religion in violation of the Establishment Clause, even though it has the effect of preferring religious-based activity over other kinds of activity and of providing a religiously-based exemption from generally applicable laws.405

This proposition is best illustrated by the Supreme Court cases dealing with Title VII's "religious entities" and "reasonable accommodation" provisions. Under the "religious entities" exemption, religious organizations are exempted from Title VII's religious discrimination prohibition with respect to employing individuals of the same religion to carry out the work of the organization.406 In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,407 the Court

omitted).  

405. See John H. Garvey, An Anti-Liberal Argument for Religious Freedom, 7 J. CONTEMP. LEGAL ISSUES 275 (1996). Professor John H. Garvey cogently argues that "the best reasons for protecting religious freedom rest on the assumption that religion is a good thing." Id. at 291. As he states:  

The religious justification is also the reason many--perhaps most--religious believers claim the right to freedom today. It enables them to perform their religious duties, and to avoid religious sanctions. It allows them to pursue the truth, as God gives them to know the truth. And no other course could bring them closer to God. Finally, the religious justification is the only convincing explanation for the split-level character of free exercise law. Sometimes religious believers and nonbelievers are treated alike, but sometimes the law protects only religious believers. This is not something that we can explain by appeals to consent and fairness. It violates the canon of reciprocity. The only convincing explanation for such a rule is that the law thinks religion is a good thing.  

Id.

unanimously held that this exemption did not violate the Establishment Clause as applied to an organization's non-profit secular activities.\textsuperscript{408} The Court first noted that the government may in some circumstances accommodate religious practices without violating the Establishment Clause and that the limits of permissible accommodation were not co-extensive with the noninterference mandated by the Free Exercise Clause. As it stated, "there is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"\textsuperscript{409} The Court then pointed out that it was a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions, and that a law was not unconstitutional simply because it allowed churches to advance religion, which is their very purpose.\textsuperscript{410} Finally, the Court concluded that there was no constitutional objection to the exemption singling out religious entities for a benefit. The court stated, "Where, as here, the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."\textsuperscript{411}

\textsuperscript{408} See id. at 339. The church operated a gymnasium, open to the public, and required that its employees be church members in good standing.

\textsuperscript{409} Id. at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). In Texas Monthly, the Court stated that "we in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." Texas Monthly, 489 U.S. at 18 n.8.

\textsuperscript{410} See Corporation of the Presiding Bishop, 483 U.S. at 335-36.

\textsuperscript{411} Id. at 338. Justice Brennan, concurring, said that while the exemption should ideally be limited to the organization's religious activities, a court's determination of whether a particular activity was "religious" or "secular" would require ongoing governmental entanglement in religious affairs and could chill the organization's religious activity. See id. at 343-44. Justice O'Connor, concurring, suggested that the exemption might be unconstitutional as applied to the organization's profit-making enterprises and emphasized that this question was not before the Court here. See id. at 349; see also McConnell, supra note 2, at 731.
Title VII's prohibition against religious discrimination requires that employer's make a “reasonable accommodation” for an employee's religious beliefs, as long as this can be done without undue hardship on the conduct of the employer's business.\textsuperscript{412} In \textit{Trans World Airlines v. Hardison},\textsuperscript{413} the Court interpreted “reasonable accommodation” very narrowly by holding that an employer was not required to accommodate a Sabbatarian's effort to avoid Saturday work where this would require the employer to disregard the seniority system established by the collective bargaining agreement.\textsuperscript{414} Had the employer been required to do so, “the privilege of having Saturdays off would be allocated according to religious beliefs.”\textsuperscript{415} In the absence of clear statutory or legislative history to the contrary, the Court was unwilling to construe the law to “require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”\textsuperscript{416} As \textit{Hardison} indicates, in the employment context, an effort to protect one employee's religious freedom may impose substantial costs on

Professor McConnell suggests that the failure to provide for such an exemption might itself be violative of the Establishment Clause. He states, if it were not for this accommodation, the government would become deeply entangled with religiously sensitive church decisions. The government would have to determine why a church fired or refused to hire a particular person, which would entail discovery into internal church governance, and it would have to determine whether the particular function is one for which religious affinity is a legitimate qualification, which would entail second-guessing the church's understanding of its religious mission. There is a strong argument that invasive and entangling regulation of this sort violates the Establishment Clause. To exempt religious institutions from some form of regulation protects the separation of church and state. In this sense, institutional religious accommodation strongly reinforces, and may be required by the Establishment Clause.

\textit{Id.}

\textsuperscript{412} See infra text accompanying notes 413-28.
\textsuperscript{413} 432 U.S. 63 (1977).
\textsuperscript{414} See \textit{id.} at 84.
\textsuperscript{415} \textit{Id.} at 85.
\textsuperscript{416} \textit{Id.} at 84.
other employees, and therefore, a narrow interpretation of "reasonable accommodation" was necessary in order to prevent a resulting preference for religion over non-religion. 417

417. See EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997) (offering an example of a "reasonable accommodation" required by Title VII). In that case, two Jewish employees of a skin care salon were denied permission to take off work on Yom Kippur, the holiest Jewish holiday. See id. at 1572-73. Because the employees had made the request two weeks in advance, the employer could have reassigned or rescheduled previously-booked appointments and so, would have suffered no hardship at all in permitting the employees to take this day off. See id. at 1576. Permitting them to take this one day off during the work week would have imposed no costs at all on other employees. See id. But cf. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996) (holding that an employer was not required to make a "reasonable accommodation" for an employee's proselytizing other employees and criticizing their personal lives which damaged working relationships).

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), stands in stark contrast with the narrow accommodation required by Title VII as interpreted in Hardison. In Thornton, the Court struck down a state law allowing employees to take off work on the day that they observed as their Sabbath on the grounds that it could impose substantial costs on other employees who would have to work on weekends in their stead. See id. at 708-10. In addition, there was no requirement that the employees who chose to take that day off were precluded by their religion from working on the Sabbath. See id. For both of these reasons, the law was not precisely tailored to protect the religious freedom of employees whose religion precluded them from working on the Sabbath. If the law was limited to those employees whose religion precluded them from working on the Sabbath, not very many employees would be able to claim its benefits, and correspondingly, the law would not be likely to impose substantial costs on other employees. See also Lupu, supra note 212, at 593; Steffey, Redefining the Modern Constraints, supra note 170, at 915-16.

In commenting on the result in Hardison, Professor Lupu has noted that the Court's narrow interpretation of Title VII's "reasonable accommodation" requirement was "explicable in light of the principle of equal associational liberty." Lupu, supra note 212, at 593. He says that this requirement "has always been at war with the basic theory of Title VII," in that all of Title VII's "other prohibited discriminations reflect a focus on status rather than conduct choices." Id. In addition, he states that "the greater the workplace accommodation of religious practice, the greater is the forced subsidy of observant employees by employers and fellow employees." Id.

In discussing Thornton, Steffey states that "even if the regulation was justified
In most of the cases where the government has acted to protect the religious freedom of individuals and religious institutions, the government's action does not impose substantial costs on others.\textsuperscript{418} as one that relieves a burden on religious exercise, the law was nevertheless constitutionally infirm because it made insufficient provision for the competing interests of the employer and other employees by imposing an undue burden on third parties." Steffey, \textit{Redefining the Modern Constraints}, supra note 170, at 915-16. \textit{See generally supra} note 287.  

\textsuperscript{418} During the time when the federal government imposed compulsory military service on young men, the law contained a conscientious objector exception. Those who were conscientiously opposed to participation in all war, on the basis of religious training and belief, were exempt from compulsory military service and were permitted to perform alternative civilian work instead. 50 U.S.C. App. § 456 (1994). The granting of conscientious objector status to some men resulted in others being drafted for military service in their place, and in this sense, the religiously-based exemption imposed very substantial costs on others. The Supreme Court interpreted "religious training and belief" very broadly to include ethical and moral beliefs that imposed a duty on the individual to refrain from participating in war. \textit{See, e.g.}, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). However, the effect was still to grant an exemption for religiously-based objection over objection that was politically, sociologically, or philosophically based. The exemption only extended to those whose beliefs caused them to be opposed to participation in all wars, not those whose beliefs drew a distinction between "just" and "unjust" war. By its broad interpretation of "religious training and belief," the Court was able to set aside the criminal convictions in the cases before it and so never had to directly confront the question of whether the religious-based exemption constituted an impermissible preference for religion over non-religion. \textit{But cf.} Gillette v. United States, 401 U.S. 437 (1971). 

In \textit{Gillette} the Court indicated that had it been faced with that question, it likely would have upheld the religiously-based exemption. It noted that "the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience." \textit{Id.} at 452. The Court also noted, "Quite apart from the question of whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in light with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" \textit{Id.} at 453 (quoting United States v. Macintosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)). \textit{Gillette} squarely presented the question of whether Congress could constitutionally limit the exemption to
Where the government does not deny unemployment compensation to a Sabbatarian who refuses Saturday work, for example, the costs of this accommodation are borne entirely by the government itself. So too, an exemption for Sabbatarians from Sunday closing laws merely equalized the competitive situation for Sabbatarians and non-Sabbatarians. Both were required to close their businesses for one day, the Sabbatarian on Saturday and the non-Sabbatarian on Sunday. Similarly, federal labor relations law exempts persons who have religious objections to joining unions from being compelled to pay union dues or representation fees, provided that the employee pays the same amount to a "substituted charity." The "substituted charity" provision has been held to constitute a "reasonable accommodation" for the employee's religious beliefs under Title VII.

There are a number of recent lower court cases upholding governmental actions designed to protect the religious freedom of individuals and religious institutions. Usually these actions involve religiously-based exemptions from generally applicable laws. Sometimes they favor a single religious group, but where this is so, it is because only that group has demonstrated that compliance with the law would substantially interfere with its religious freedom.

those who objected to participation in all wars, and the Court held that it could. It accepted the government's argument that it was not possible to determine what constituted a religiously-based objection to participation in a particular war and that fairness concerns militated against recognizing this kind of exemption. See id. at 454-60. For a strong criticism of this decision, see CHOPER, supra note 14, at 128-31. Compulsory military service was ended in 1972 and is not likely to reappear, so the Gillette decision may be of limited significance. 419. There appeared to be no question that the Sabbatarian exemptions were constitutional. See, e.g., Braunfeld v. Brown, 366 U.S. 599 (1961); Commonwealth of Kentucky v. Arlan's Dep't Store, 357 S.W.2d 708 (Ky. 1962), appeal dismissed, 371 U.S. 218 (1962). In Braunfeld, the Court held that such an exemption was not required by the Free Exercise Clause and noted that a number of states did provide such an exemption, stating that "this may well be the wiser solution to the problem." Braunfeld, 366 U.S. at 608.

These cases include the following: an exemption from social security self-employment taxes for members of religious sects that have tenets opposed to participation in the social security system and that provide reasonable support for their dependent members. A zoning law exception that permitted non-profit day care facilities and nursery schools to operate in church buildings located in residential neighborhoods, an exemption from the federal Eagle Protection Act to permit members of Native-American tribes to use eagle feathers for religious purposes.

422. See Droz v. Commissioner of IRS, 48 F.3d 1120 (9th Cir. 1995). The exemption extends only to self-employed taxpayers. In United States v. Lee, 455 U.S. 252 (1982), the Supreme Court held that the imposition of social security taxes on an Amish employer who had failed to pay his own taxes and failed to withhold the taxes from the wages of his Amish employees did not violate the Free Exercise Clause. See id. at 261. The plaintiff in Droz claimed that he had religious objections to paying the social security self-employment tax; however, he was not entitled to assert the objection under the law because he was not a member of a recognized sect. The decision in Lee foreclosed his free exercise claim. Droz, 48 F.3d at 1123. The court in Lee commented on the self-employed exemption, stating that it provided for a narrow category which was readily identifiable, in that “self-employed persons in a religious community having its own ‘welfare’ system are distinguishable from the generality of wage earners employed by others.” Lee, 455 U.S. at 260-61. The plaintiff’s Establishment Clause challenge in Droz was based on the argument that exemption favored one religion over another. Droz, 48 F.3d at 1122. The court rejected the challenge, saying that the exemption was for an organization that had its own welfare system and so did not discriminate between religions based on religious beliefs. See id. at 1124.

423. See Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993). The exemption was contained in a zoning law that permitted churches in areas zoned as single-family residential. See id. at 486. The law was challenged by the owner of commercial day-care facilities who wanted to operate in residential neighborhoods. See id. at 487. The city justified the exemption as being related to avoiding entanglement with the decision making processes of a religious organization. In upholding the ordinance, the court relied heavily on the Supreme Court’s decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). See Cohen, 8 F.3d at 490-92.

424. See Rupert v. Director, United States Fish and Wildlife Serv., 957 F.2d 32 (1st Cir. 1992). The exemption was challenged by a member of an “all-race”
exemptions from substance abuse laws for the use of peyote in the religious ceremonies of Native-American tribes, an exemption from the federal Humane Slaughter Law for Jewish religious slaughter and the religious slaughter of other faiths that use the severance of carotid artery method of slaughter, and an exemption for Amish buggies from the requirement that slow-moving vehicles display a special emblem.


425. See Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989). Again, the exemption was challenged in these cases, not by ordinary drug users, but by other groups seeking to use peyote for religious purposes. And again, the courts relied on the tribal sovereignty and special relationship justification to avoid the preference between religion claims. If the exemption had been for use by all religious groups, as opposed to ordinary drug users, there would be no question that the exemption did not violate the Establishment Clause. During Prohibition, there was an exception for the use of wine in religious ceremonies, and it cannot be doubted that the Court would have upheld this ceremonial use exception against Establishment Clause challenge. See also Laycock, supra note 100, at 1003.

Professor Laycock notes that exemptions such as these are fully consistent with “substantive neutrality” toward religion. As he states:

To prohibit the consumption of alcohol, without an exception for religious rituals, is to flatly prohibit important religious practices. Such a prohibition would discourage religious practices in the most coercive possible way—by criminalizing it. Many believers would abandon their religious practice; some would defy the law; some would go to jail. Such a law would be a massive departure from substantive neutrality.

Id.

426. See Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974). Although this case is not of recent origin, it is included because it illustrates very clearly the kind of precisely-tailored exemptions that are permissible under the Establishment Clause.

427. See State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (holding that such an exemption was required by the state constitution and that the exemption did not violate the Establishment Clause).
It is not disputed even among the most ardent "separationists" that the government may, consistent with the Establishment Clause, take actions to protect the religious freedom of individuals who are subject to governmental control. A public school system may try to protect the religious freedom of public school students, by respecting religious prohibitions against immodest dress or not appearing naked in the presence of others, and not require these students to wear gym clothes or to shower. Likewise, the military and the prison system may try to accommodate the religious needs of persons under their control, by providing them with chaplains, releasing them for religious services, excusing them from uniform requirements, and enabling them to observe dietary restrictions.

In summary, the Establishment Clause permits the government to take action that is precisely tailored to protect the religious freedom of individuals and religious institutions. This means that the government can voluntarily take many actions that it is not required to take by the Free Exercise Clause.

As long as the purpose and effect of the governmental action is to protect individual and institutional religious freedom, as opposed to "accommodating religion" generally, and as long as the action

428. Moslem students must say prayers during the school day, and it should be permissible for the public schools both to excuse the students from class so that they can say these prayers and to provide a private place for them to do so. This is the practice of the Dearborn, Michigan school system, which enrolls a large number of Moslem students.

429. See Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (rejecting an Establishment Clause challenge to the military chaplaincy).

430. Congress by statute has overturned the regulation upheld in Goldman v. Weinberger, 475 U.S. 503 (1986), so as to permit the wearing of religiously-required headgear by military personnel. See 10 U.S.C. § 774 (1994).

431. The law invalidated in Thornton v. Caldor, Inc., 472 U.S. 703 (1985), which gave employees the right to take off work the day that they designated as their Sabbath, is an example of a law that "accommodated religion generally" because it gave a preference to employees who chose their day off for religious reasons. Therefore, it was unconstitutional. If the law had permitted employees who were precluded by their religion from working on the Sabbath to take the day off, the law would have the purpose and effect of protecting the religious freedom of individuals. The question would then be whether the law was...
is precisely tailored to that end,\textsuperscript{432} it does not amount to a preference for religion and thus is consistent with the Establishment Clause.

IV. CONCLUSION

In this writing, I have attempted to bring the perspective of constitutional litigation to an understanding of the Establishment Clause. When the Establishment Clause is approached from this perspective, I submit that it is not at all difficult to understand the "law of the Establishment Clause" or the Supreme Court's application of it.

The "law of the Establishment Clause" consists of four elements: (1) the overriding principle that the Establishment Clause commands complete official neutrality toward religion, (2) three operative principles—the three elements of the \textit{Lemon} test, (3) a number of subsidiary doctrines, and (4) the Court's precedents in what I have identified as the five major areas of Establishment Clause litigation. It is the "law of the Establishment Clause" that is used by litigating lawyers and by the courts—including the Supreme Court—to resolve the Establishment Clause issues that arise in practice.

I have discussed at length the application of the "law of the Establishment Clause," by the Supreme Court and by the lower courts in recent years, in the five major areas of Establishment Clause litigation. I submit that, contrary to the "conventional wisdom" of academic commentary, the "law of the Establishment Clause" is fairly well-settled, and that most of the Establishment Clause issues arising today are fairly peripheral and involve the application of settled doctrine and precedent to the facts of

\textsuperscript{432} See Trans World Airlines v. Hardison, 432 U.S. 63 (1977). \textit{As Hardison} makes clear, in determining whether the action is precisely tailored to that end, it is relevant to consider the costs that the action imposes on other persons. Where it does impose such costs, as in \textit{Hardison}, the justification must be quite strong.
particular cases.

The ongoing academic debate regarding the proper interpretation of the Establishment Clause and its function in our constitutional system will no doubt continue apace. I hope that in this Article I have been able to provide some understanding of the meaning of the Establishment Clause and of how it operates in practice to protect the religious freedom of the American people.