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Articles

And a Child Shall Lead Them:* Justice O'Connor, The Principle of Religious Liberty and Its Practical Application

Benjamin D. Feder†

I. Introduction

In the more than forty years since the U.S. Supreme Court decided *Everson v. Board of Education*,¹ lawyers, scholars, laymen, and judges have struggled to find a consistent, logical method for interpreting and applying the terse language of the religion clauses of the first amendment.² Most of the attention (and controversy) has focused on the first of these, known as the establishment clause. After closely examining the cases, opinions, and articles in this area, only one proposition may be confi-

* This title stems from a comment made by Justice Sandra Day O'Connor in her concurring opinion in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2496 (1985), in reference to her status then as the Court's junior member.

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1. 330 U.S. 1 (1947). This was the Court's first impression of the limitations placed on government behavior by the establishment clause; earlier cases brought under this clause were disposed of on other grounds. See *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Quick Bear v. Leupp*, 210 U.S. 50 (1908). The Court had previously analyzed the scope of the free exercise clause. See *Reynolds v. United States*, 98 U.S. 145 (1878); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

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

dently stated: any approach to the establishment clause which does not either explicitly or implicitly consider and reference its results to an underlying principle of individual religious liberty must fail, for it can never do more than beg the question as to the basic purpose of the religion clauses within our constitutional structure.

There exists no talismanic catchword, test, or methodology that will consistently lead the way. The Supreme Court, and those of us who must comport with its interpretations, should recognize that "religious liberty" presupposes at least four different types of threatening interactions between the institutions of government and matters of religious belief. Both history and logic instruct us that religious liberty seeks equally to protect the state from certain types of religious influence, as it does to protect religious beliefs from state interference. Religious liberty also suggests an equal standing and worth among all sects in the eyes of the state, and prohibits government interaction with religion that can lead to the use of state institutions and resources to foster sectarian factionalism. Finally, concern for individual religious liberty requires that the state take cognizance of instances where laws of general application may unintentionally, but nonetheless substantially, burden an individual's free choice in matters of religious belief. These different values are not necessarily consistent with one another; indeed, their application in particular cases may sometimes conflict. Proper interpretation of the religion clauses requires a careful balancing among these different elements in a way that will best further the underlying principle of individual religious liberty. The purpose of this Article is to suggest such a methodology.

This Article will first examine the line of establishment clause cases that begins with *Everson* and ends with the 1971 case of *Lemon v. Kurtzman*.³ The Court, in these cases, failed to articulate a normative principle of individual religious liberty, against which such judicial doctrines as "separation of church and state," "neutrality," or the tripartite test of *Lemon*⁴ could

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

4. *Id.* at 612-13 ("The [government behavior] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with reli-

be applied. The Court has variously relied on these doctrines without the benefit of an understood reference point, resulting in an accumulation of inconsistent case law.⁵ There will then follow an attempt to set forth a definition of individual religious liberty, along with a demonstration as to how the Court must protect it. Finally, this Article will seek to square the views herein set forth with those articulated in the past four terms by Justice O'Connor⁶ and argue that her approach may provide the Court with the basis for developing an analytically sound set of guidelines for application in future cases.

II. 1947-1971 — A Brief Overview

A. *The Early Cases: 1947-1952, Confusing the End with the Means*

The cause of much of the recent confusion in this area has its roots in the cases decided before *Lemon*.⁷ The Court, by failing to make explicit the underlying purposes of the religion clauses, and in failing to explain adequately the proper relationship between the establishment and the free exercise clauses, created a firm set of guidelines while simultaneously undercutting their usefulness for future application.

gion.' ") (citations omitted).

5. *Compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (New York's tuition reimbursement program for parents of religious school children offends the establishment clause through its primary effect of advancing religion) with *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota statute authorizing tax deductions for expense of sending child to parochial school has sufficiently secular purpose so as not to violate the establishment clause). *Compare* *Stone v. Graham*, 449 U.S. 39 (1980) (Kentucky statute requiring Ten Commandments be posted in every public school classroom violates the establishment clause) with *Lynch v. Donnelly*, 465 U.S. 668 (1984) (no violation of the establishment clause found where city annually erected Christmas display on privately owned park).

6. See *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring); *Wallace v. Jaffree*, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914, 2918 (1985) (O'Connor, J., concurring); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3231 (1985) (O'Connor, J., concurring in part and dissenting in part); *Aguilar v. Felton*, 105 S. Ct. 3232, 3243 (1985) (O'Connor, J., dissenting); *Bowen v. Roy*, 106 S. Ct. 2147, 2164 (1986) (O'Connor, J., concurring in part and dissenting in part); *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2873 (1987) (O'Connor, J., concurring).

7. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In the 1947 case of *Everson v. Board of Education*,⁸ the Court unanimously adopted the concept of “a wall of separation between Church and State”⁹ as the proper starting point for addressing questions arising under the establishment clause. The Court was unable to make clear, however, that “separation” was a broad term that could signify different values, depending on the type of church-state interaction that was feared. The “wall” metaphor derives from the writings of Thomas Jefferson and was used by the Court as far back as the 1870’s.¹⁰ It was Jefferson’s¹¹ particular brand of separationist doctrine that ran most heavily through the opinions in *Everson* and *Illinois ex rel. McCollum v. Board of Education*.¹² In *Everson*, a five to four majority upheld the expenditure of public money for transportation of parochial school children. In *McCollum*, a near-unanimous Court struck down a “shared-time” program, which allowed religious instruction in public schools during the school day. The absolutist language used by the majority (and the result urged by the minority) in *Everson* aligned itself closely with the Jeffersonian view that, consistent with the 18th century enlightenment distrust of organized religion, separation was absolutely necessary to keep the church from gaining sway over the public coffers and public policy.¹³

8. 330 U.S. 1 (1947).

9. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

10. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson’s letter to the Danbury Baptist Ass’n).

11. Three basic approaches that utilize the principle, “separation of Church and State,” have been related to the views of Thomas Jefferson, James Madison, and Roger Williams. When this Article classifies a case as employing “Jefferson’s separation,” it is only done to clarify the analysis and not to imply that the Court was consciously adhering to any particular set of guidelines.

12. 333 U.S. 203 (1948). *See Paulsen, Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 322-26 (1986).

13. *See T. JEFFERSON, A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (J.P. Boyd ed. 1950). *See also Katz, Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 96:

Howe described the Jefferson principle of separation as rooted in deistic rationalism and anticlericalism. Church and State should be separated “as the safeguard of public and private interests against ecclesiastical depredations and excursions.” Following this view, the Court seemed to have assumed that “the First Amendment intended to keep alive the bias of the Enlightenment which asserted that government must not give its aid in any form to religion lest impious clerks

The majority opinion in *McCullum*, written by Justice Black, struck down the Illinois program on the sole basis that it was not "separation."¹⁴ The separate opinions of Justices Frankfurter and Jackson, however, recognized the need to consider competing values¹⁵ and expressed concern that painting with broad strokes in this area could well lead to results contrary to those intended by the Court.¹⁶ In an opinion that varied greatly in both tone and substance from that of the majority, Justice Frankfurter relied on the James Madison view that separation was a tool for maintaining equality among different sects and avoiding politico-religious factionalism,¹⁷ rather than on Jeffersonian distrust.

In *Zorach v. Clauson*,¹⁸ the Court upheld a "time release" program, in which students were permitted to leave school early in order to receive religious instruction. While it may be endlessly debated whether the case was factually distinguishable from *McCullum*, the tone and language of Justice Douglas' majority opinion suggest that the *Zorach* Court was merely attempting to allow the separation principle to expand to the limits of its own logic. Having already identified as goals under the establishment clause the need to keep government free from attempted domination by powerful religious groups and (in Frankfurter's opinion in *McCullum*) the need to prevent strife and competition between various religious groups (or religious and

tighten their grip upon the purses and the minds of men."

Id. (quoting HOWE, *THE GARDEN AND THE WILDERNESS* (1965)).

14. *Illinois ex rel. McCullum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948).

15. *Id.* at 212-13 (Frankfurter, J., concurring).

16. *Id.* at 235-37 (Jackson, J., concurring).

17. *Id.* at 217 (Frankfurter, J., concurring).

The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

Id. (emphasis added). Accord Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615, 619 (1981). "The Memorial's argument against assessment emphasized the tendency of religious establishment to promote faction and to leave government impotent to combat it. Madison argued not that religion was unimportant, but that religious establishment is *fundamentally divisive*." *Id.* (emphasis added).

18. 343 U.S. 306 (1952).

nonreligious groups), it necessarily followed that the establishment clause also fulfilled the need to keep religious groups free from attempted domination by a hostile government. This third strand of separationist doctrine is usually attributed to the writings of Roger Williams.¹⁹

Three strands of separationist doctrine were thus clearly identified: Jefferson's desire to keep government free from religious influence, Williams' view that the church must be kept secure from government intrusion, and Madison's fears that religious and secular coinvolvement would inevitably lead to sectarian factionalism and inequality. This is by no means to suggest that these three strands are logically consistent or that the cases in which each may be applicable should be mutually exclusive. The opposite is closer to the truth; Jefferson, Williams, and Madison were each addressing the idea of separation of church and state from different perspectives, and one may derive from each a different notion of exactly where "the wall" ought to be erected and how high it needs to be built.

The Court, however, in these early cases failed to address effectively these differences, or even to identify them. More crucially, the Court was treating the doctrine of "a wall of separation between Church and State"²⁰ as the proper *end* to be sought by the establishment clause, rather than as a *means*, or governing principle, for reaching some deeper purpose. Looking back at the Court's failure, at this early juncture, to distinguish explicitly between the underlying principle sought and the governing principle used, one may clearly discern the root causes of much of the later confusion.

Professor Katz recognized this problem inherent in the Court's approach, and suggested an answer:

[T]he limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty, not vice versa.

The recognition of this proposition would place the recent controversy in a new light. Much of the opposition to the "no aid" principle has arisen because the principle was expressed in terms of strict "separation." If it is understood that the separation prin-

19. See Katz, *supra* note 13, at 96-97.

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

ciple does not preclude action to avoid restraints on religious freedom, one source of confusion would be eliminated²¹

The concept of "religious liberty," for all its definitional problems, fits better as an underlying purpose of the establishment clause than the notion of erecting "a wall of separation between Church and State." Governing principles are necessary to provide guidance and some measure of predictability. But they cannot provide such guidance without reference to some recognized further end, especially in such a sensitive area of constitutional law.

B. 1960-1971 — *The Evolution of the Three-Pronged Test of Lemon v. Kurtzman*

Throughout the 1960's, the Court refined and expanded its reliance on governing principles. But none of these doctrines was properly related to a fully explicated underlying value. Justice Frankfurter's long concurrence in *McGowan v. Maryland*²² presented an example of how a proper approach could have been developed. The Court in this case upheld the constitutionality of Sunday Closing laws on the basis of the state's contention that the laws in their current form served valid secular purposes.²³ Justice Frankfurter's concurring opinion expressed dissatisfaction with the Court's reliance on the separation principle, at least as it had been articulated in *Everson* and *McColum*. He specifically alluded to the due process concept of "liberty"²⁴ and specifically sought to show how "separation" was of primary importance as a means of guaranteeing this liberty, but not as an end in itself.²⁵ For Justice Frankfurter, it was necessary that

21. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428-29 (1953) (emphasis added).

22. 366 U.S. 420, 459-559 (1961) (Frankfurter, J., concurring).

23. *McGowan v. Maryland*, 366 U.S. 420, 445-46 (1961).

24. *Id.* at 460-61 (Frankfurter, J., concurring). The opinion also made some effort to relate both religion clauses to this concept. *Id.* at 463.

25. *Id.* at 461.

By its nature, religion — in the comprehensive sense in which the Constitution uses that word — is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall con-

"separation of church and state" remain a "not rigidly precise but revealing phrase,"²⁶ to be given content by reference to an underlying principle of religious liberty and not by strict definitions.²⁷

In *Torcaso v. Watkins*,²⁸ the Court struck down a Maryland law requiring a declaration of belief in the existence of God as requisite for holding any public office.²⁹ Justice Black's majority opinion broadly reaffirmed the separation principle as enunciated in *Everson*,³⁰ yet failed to identify the specific evil sought to be prevented, except in the general assertion that "[t]he power and authority of the State of Maryland thus is put on the side of one particular sort of believers"³¹

Engel v. Vitale,³² the Regents' Prayer Case, followed in a similar vein. While the result reached by the Court may probably have been explained by reference to either the Jefferson, Williams, or Madison views toward separation, the language employed by the Court was broad enough to encompass all three,

tinue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state.

Id.

26. *Id.* at 460.

27. This placed Justice Frankfurter at the opposite pole from Professor Kurland, who argued for an approach which placed the higher emphasis on precision and predictability, rather than on furtherance of an underlying value. See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (urging a governing principle based on a concept of strict neutrality):

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

Id. at 6.

Whatever the philosophical failings of Kurland's approach, one cannot deny the practical difficulties inherent in the Frankfurter methodology. As Professor Kurland noted, "One may admire the extensive research and history revealed in [Justice Frankfurter's] concurring opinion and yet wonder whether its very breadth of coverage will add clarity or confusion for those lawyers and judges called upon to put these materials to further use in the future procession of constitutional litigation." *Id.* at 90-91.

28. 367 U.S. 488 (1961).

29. *Id.* at 495-96.

30. *Id.* at 492-95.

31. *Id.* at 490.

32. 370 U.S. 421 (1962).

while the identified evil was again stated abstractly.³³ Perhaps the Court was concerned that one or more organized religions would gain sway over certain functions of government. Perhaps it feared that the state had impermissibly intruded into the realm of religion by composing and urging the recitation of a prayer. The Court may have been worried that the institutions of the state would devolve into battlefields on which sectarian differences might be fought.³⁴ A more crucial omission, however, lay in the Court's failure to explain how "separation" worked to protect those who had challenged the Regents' Prayer in the first place.³⁵

The following year, in *School District of Abington v. Schempp*,³⁶ the Court set down a new governing principle of "wholesome neutrality;"³⁷ the Court would require that both "the purpose and primary effect"³⁸ of challenged statutes and practices be shown to be secular. But the Court's opinion did not manage to resolve the problems that were building from the inconsistencies and sweeping characterizations of the earlier cases, and the difficulties in relying on the doctrine of "separa-

33. *Id.* at 430-31:

The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion.

Id.

34. *Cf. Clark, Religion and the Law*, 15 S.C.L. REV. 855 (1963).

35. See Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963). Though in full agreement with the result reached, Professor Kauper was somewhat less than enthusiastic about the Court's approach:

It is . . . the Court's broad and absolutist interpretation of the first amendment, its disregard of the sanctions furnished by history for religious practices in the public schools, its indifference to the problem of standing, *its failure to relate the establishment limitation to meaningful considerations of personal liberty* . . . and its failure to come to grips with the delicate problem of the rights of non-conformists in a community that recognizes a common religious heritage that present the constitutional problems and difficulties.

Id. at 1065-66 (emphasis added).

36. 374 U.S. 203 (1963).

37. *Id.* at 225.

38. *Id.* at 222.

tion of church and state" clearly appear. The Court spoke of "neutrality" as a means for protecting "religious liberty," but it made no attempt to provide that term with any substance, quoting instead passages from previous opinions that described the doctrine of separation.³⁹ The Court recognized the influence of the different views of Jefferson, Williams, and Madison on the religion clauses,⁴⁰ but failed to tie these views explicitly to some basic framework that would make clear the exact harm that was being prevented and the basic purpose that the Court was trying to effect.⁴¹

The Court decided two establishment clause cases in 1968. In *Epperson v. Arkansas*,⁴² the Court struck down an "anti-evolution" statute for the state's public schools. In *Board of Education v. Allen*,⁴³ it upheld a New York program that called for parochial school children to receive free textbooks on secular subjects from public schools. The Court, in both these cases, ostensibly relied upon the "purpose and primary effect" test from

39. *Id.*

40. *Id.* at 214.

41. *Cf. id.* at 312-13 (Stewart, J., dissenting):

That the central value embodied in the First Amendment — and, more particularly, in the guarantee of "liberty" contained in the Fourteenth — is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized. . . .

It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. . . .

. . . .

. . . What these cases compel . . . is an analysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

Id.

Justice Clark, author of the *Schempp* opinion, subsequently published a defense of *Schempp* in which he managed to articulate a better justification for the governing principles of separation and neutrality. See Clark, *supra* note 34.

[O]urs is a unique situation; people of more than three score nationalities, having many basic differences in religious beliefs, have come to our shores and formed our national citizenship. Consequently, when confronted by the challenges of this religious pluralism our freedom in such matters can only be protected, as the Constitution dictates — not by a wall between government and religion — but through a wholesome separation of a concordant nature. Otherwise, we will find ourselves in the midst of religious wars that would be destructive of our being. To me the problem is just that simple.

Id. at 855.

42. 393 U.S. 97 (1968).

43. 392 U.S. 236 (1968).

Schempp.⁴⁴

It was against this backdrop that the Court decided the case of *Walz v. Tax Commission*⁴⁵ in 1970. At issue was a New York State property tax exemption accorded to a variety of institutions engaged in "religious, education, or charitable purposes."⁴⁶ Did "separation" require that the state exclude religious organizations from this financial benefit, or at least seek to measure the degree to which each religious organization engaged in wholly "education and charitable" functions, and prorate their taxes accordingly? Or did "separation" require that the state avoid intruding into the affairs of the religious organizations and not place a special burden upon sectarian institutions engaging in "educational and charitable" activities that was not placed on similar secular organizations?⁴⁷

The majority opinion of Chief Justice Burger recognized the strong need for flexibility, "room for play in the joints,"⁴⁸ if difficult questions such as the one presented were to be solved. What the opinion failed to do was to state plainly and explicitly how this was to be accomplished. The "purpose and primary effect" test could provide little guidance here — whether the state disallowed or permitted the tax exemption, the primary effect would certainly be found either to aid or to hinder religion. The Court instead proposed a new test to ensure that "benevolent neutrality"⁴⁹ was maintained: the new test prohibited "excessive government entanglement with religion."⁵⁰ Under this standard, the Court held that close regulation of religious organizations would involve a greater degree of government entanglement than would the allowance of the exemption.⁵¹ Many no doubt agreed with the majority's statement that "the purpose [of the religion

44. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

45. 397 U.S. 664 (1970).

46. *Id.* at 666-67.

47. *See id.* at 668: "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." *Id.*

48. *Id.* at 669.

49. *Id.*

50. *Id.* at 674.

51. *Id.* at 674-76.

clauses] was to state an objective, not to write a statute,"⁵² but could only conjecture as to what the Court believed that objective to be.⁵³

The following term, in *Lemon*,⁵⁴ the Court combined the two tests developed in *Schempp* and *Walz* into a single, three-pronged test.⁵⁵ The failure to enunciate a clear underlying principle might never have become a major problem had the Court not been forced to grapple with the problems created by state aid to sectarian institutions.⁵⁶ The *Lemon* test, standing alone, simply could not provide clear guidance on this issue.⁵⁷ The strong secular state interests involved,⁵⁸ the legacy of the result

52. *Id.* at 668.

53. Professor Kauper and Professor Katz both hailed the *Walz* decision as giving implied recognition to some substantive normative principles underlying the religion clauses. See Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179, 201 (1970):

[W]hile the entanglements terminology is new, the substance of the idea as an important consideration in the interpretation of the establishment clause is not. Underlying the twin religion clauses of the first amendment is the idea that the state and the churches have separate functions to perform and that the state may neither intrude into the affairs of the churches nor actively intervene in religious matters.

Id. See also Katz, *supra* note 13.

54. 403 U.S. 602.

55. *Id.* at 612-13. For the *Lemon* test, see *supra* note 4.

56. Compare the clarity of *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (*Lemon* test applied to grant of zoning authority to religious institutions) with the confusion of *Wolman v. Walter*, 433 U.S. 229 (1977) (attempt to apply *Lemon* to various forms of nonfinancial aid to sectarian schools).

57. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of services and instructional materials to nonpublic schools); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (state grants to religiously affiliated colleges); *Wolman*, 433 U.S. 229. Perhaps no more need be said about these cases than that none of them contained an opinion that was able to command, in its entirety, a clear majority of the Court. The Court's frustration was expressed in Justice White's majority opinion in *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980): "[Our] course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause." *Id.* Such a lack of predictability could be acceptable if the values that the Court was seeking to effect were clearly understood. Since they are not, the Court's forays in this area have not only been frustrating, but a potential threat as well to individual religious liberty. Cf. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche in city erected Christmas display).

58. See Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 283 (1968) ("At least some governmental aid to support parochial education serves a primary or independent secular purpose. No one can deny the state's legitimate interest in improving the educational quality of all schools . . ."); Kauper, *The Supreme*

of *Everson*,⁵⁹ and the endless myriad of subtle forms such aid can assume would have made these cases difficult to adjudicate even with a recognized substantive principle of religious liberty as a reference point. It was soon apparent that the Court was running on a treadmill and that the *Lemon* test was resting on weak foundations.⁶⁰

Court and the Establishment Clause: Back to Everson?, 25 CASE W. RES. 107, 128 (1974) (importance of parochial schools in "maintaining a pluralistic society and preserving freedom of choice"); Nowak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883, 895 (1976) ("[T]he question must [be] faced as to whether or not the state will offer alternative forms of subsidized education so that citizens individually may choose a form of education other than that which is provided in kind by the government."). Accord Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 220 (1973):

The *Pierce* case has long been a problem in the church and state area. For if there is a state imposed duty to attend schools, there is nonetheless a right to secure the education that the state compels in private schools. These schools, it is frequently alleged, are performing a state function for which they are entitled to payment from the public coffers. The question . . . is not likely to be answered with any finality so long as both *Pierce* and the compulsory education laws must be reconciled.

Id.

59. See Kirby, *Everson to Meek and Roemer: From Separation to Détente in Church-State Relations*, 55 N.C.L. REV. 563, 564 (1977): "[*Everson*] may hold the record for being cited most often as a precedent on opposite sides of the same question." *Id.*

60. See Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom*, 64 MINN. L. REV. 453, 457-58 (1980):

[I]t is really a nontest You can put the conclusion on such a law that it does or does not benefit religion and that's its purpose, but how does a court decide that? What is the functional test that tells us whether the purpose and effect are predominantly religious or secular?

Id. See also Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783, 818 (1978):

In the context of governmental aid to sectarian schools, the Court has been answering questions of degree in relation to an inappropriate set of principles, principles which have lost whatever efficacy they may once have had as viable constitutional standards. The materials and structure of the conceptual framework do not match.

Id.; Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 19-20 (1978). "The entanglement part of the Court's triad is either empty or nonsensical. . . . [T]he [*Lemon* test] hardly elucidates the Court's judgments. Nor does it cover the plastic nature of the judgments in this area. Judicial discretion, rather than constitutional mandate, control the results." *Id.*

III. The Underlying Value

What is "religious liberty?" What are the evils to be prevented by the religion clauses? How do the two clauses interact with one another?

An underlying principle in constitutional law sets down a normative statement concerning the relationship between the individual and the general community.⁶¹ When the Court articulates an underlying principle, it necessarily elevates a certain value or set of values and creates, in effect, a sacred cow. The Court subsequently subordinates certain expressions of majority will through legislative enactment, long standing historical customs or common-law rules, and even competing inferior, individual constitutional claims to this particular principle when they conflict. The commitment to a broad concept of "speech,"⁶² i.e., to a society in which ideas and opinions are afforded the widest possible scope and protection, stands out as one such principle: it states a normative belief that under our Constitution, the proper relationship between the individual and the general community requires open debate and exchange of views, to the end that each entity may in such a way function at its fullest potential. The doctrine against prior restraints is one governing prin-

61. The term "general community" refers to society in the classical liberal sense, as a nexus of social relationships between individuals of equal intrinsic worth, expressing and acting through some form of representative institution. *See generally* A. MACINTYRE, *A SHORT HISTORY OF ETHICS* 157-89 (1966). *See also* Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1471 (1984).

62. The questions concerning the proper scope and substantive contents of such normative principles, the proper sources for deriving such principles, and whether indeed the judiciary possesses, as an institution, sufficient competence to articulate such principles are, of course, in themselves a separate genre of constitutional law. *See generally* J. ELY, *DEMOCRACY AND DISTRUST* (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U.L. REV. 469 (1981); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

The proper scope of the underlying principle for the free speech clause remains widely debated. *See, e.g.*, Bork, *supra* note 62; *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). The point, though, is that the Court, when confronted with a claim brought under the free speech clause, explicitly references the facts of the case against an articulated underlying principle, in order to balance out the competing interests of the individual and the general community. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971).

ciple intended to effect this end.⁶³ the rule imposing an excessive burden on public figure plaintiffs in libel suits⁶⁴ is another.

The religion clauses of the first amendment require a commitment to a broad concept of religious liberty. This requires a commitment to a society in which an individual's entitlement to equal standing within the general community may not be affected either by the espousal or disaffirmance of any religious beliefs.⁶⁵ The religion clauses primarily achieve this commitment by prohibiting any coercion, evaluation, or judgment whatsoever of an individual's religious beliefs by the government.

A. *The Separate Elements That Comprise the Value of Religious Liberty*

The choices of whether or not to recognize some form of transcendental force or power, or some personified embodiment of such a force, and the manner chosen as to how such recogni-

63. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

64. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

65. Some recent commentators have suggested that a principle of equality provides the essential underlying value of either one or both of the two clauses. One would even go so far as to graft the analytical methodology of the equal protection clause onto the Court's current establishment and free exercise clause jurisprudence. See Paulsen, *supra* note 12. Professor Lupu stops far short of this innovative approach, arguing instead in favor of an approach to the establishment clause that can ultimately be harmonized with the underlying value of the equal protection clause:

Government action must advance public values in a manner consistent with a framework within which all are treated as having equal worth. The constitutional wrong committed by acts that discriminate against racial or ethnic minorities, for example, is the failure to treat members of those groups as having such worth. . . .

. . . [N]onestablishment parallels this more general requirement of equal respect. . . . [F]avoring a preferred group may be as dangerous and disrespectful as explicitly harming a hated group.

Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 745-46 (1986).

"Equal" religious liberty undoubtedly constitutes an essential element for individual religious liberty, just as other individual liberties are necessarily dependent upon the equal protection of the law. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (constitutional right to move from state to state penalized by welfare waiting period). Attention must then focus upon government treatment of religion, in order to understand exactly when and how forbidden inequalities may arise.

This analysis incorporates the necessity for equality in government treatment of all religious beliefs, and between religious and nonreligious beliefs, as an element of the principle of individual religious liberty. See *infra* text accompanying notes 80-82 (describing the "Madisonian" element).

tion must be fulfilled and how such fulfillment shall relate to the actions and behavior necessary to maintain one's existence, constitute a fundamental aspect of the formation of an individual's separate identity.⁶⁶ The state may in no way influence this choice, whether directly or implicitly. The public institutions through which the general community usually manifests its collective value judgments may not do so in regard to these matters. A substantive principle of religious liberty must represent this guarantee. The notion of "separation of church and state" represents the primary, but not the only governing principle which achieves this guarantee.

Viewed in this manner, the inconsistencies present in the Court's analyses of "separation" in *Everson*, *McCullum*, and *Zorach* begin to fade, and Professor Katz's argument from 1953, that "the limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty, not vice versa,"⁶⁷ is vindicated. The doctrine of religious liberty presupposes at least four different types of threats that the individual may encounter. Professor Katz correctly understood that the probable intention of the Court in its first three establishment clause cases was to explicate and flesh out this doctrine through its analysis of the primary governing principle.⁶⁸ Unfortunately, the Court apparently failed to grasp the crucial distinction between religious liberty — the end it was seeking — and separation — the means it was employing — to achieve that end. "Separation of church and state" subsequently became elevated to the level of a constitutional mandate, while a proper understanding of *what* was being separated and *why* separation was necessary became obscured.⁶⁹

66. This Article recognizes the severe problems associated with any definition of religion. They are, for the most part, beyond the scope of this Article. See generally Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579.

67. See *supra* note 21 and accompanying text.

68. Cf. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring): "[A]greement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and state,' does not preclude a clash of views as to what the wall separates." *Id.*

69. See *McGowan v. Maryland*, 366 U.S. 420, 461-62 (separate opinion of Frankfurter, J.): "[T]he several opinions in *Everson* and *McCullum* [and in *Zorach*] make sufficiently clear that 'separation' is not a self-defining concept." See also Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development — Part I. The Religious*

The first element of religious liberty seeks to keep the general community free from any government-sponsored religious influence. This element corresponds with the views attributed to Jefferson and is best exemplified by the metaphor of "a wall of separation."⁷⁰ The primary concern of Jefferson lay in the possibility that an organized church to which a majority of citizens belonged would, with the acquiescence of that majority, gain influence over the functions of government. The premise of this view rests on the idea that such a majority religious viewpoint, in union with government, could severely burden the ability of the nonconforming individual to believe as (s)he would otherwise choose. Such a burden could take several forms: conditioning the receipt of certain privileges or benefits upon adherence to the majority belief,⁷¹ exalting in some way the beliefs and manners of worship of the majority,⁷² or mandating adherence to the majority belief as a qualification for holding a position of public office.⁷³

The government could on the other hand adhere to a policy that provided for the widest possible measure of protection and toleration for minority religious viewpoints, yet choose to support the majority beliefs through the expenditure of public

Liberty Guarantee, 80 HARV. L. REV. 1381, 1383 (1967):

[T]he establishment clause embodies a concept of separation of church and state which takes on precise meaning only in light of prevailing assumptions as to the appropriate sphere of action for each institution. As the role of the state, with the passage of time, transcends traditional boundaries and assumes new dimensions, the idiomatic meaning of "separation" must be revised to conform with the new realities if original purposes and expectations are to be realized.

Id.

70. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's letter to the Danbury Baptist Ass'n).

71. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) (state antidiscrimination statute limited to adherents of Sabbatarian beliefs).

72. *See, e.g., School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (bible reading in public schools).

73. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488 (1961) (oath as to belief in God required for public office). *See also* T. JEFFERSON, *supra* note 13:

[O]ur civil rights have no dependance [sic] on our religious opinions, any more than our opinions in physics and geometry; that therefore the proscribing any citizen as unworthy of the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right . . .

Id. at 545-46.

funds. Although this places no *direct* burden upon any nonconforming individual, such action constitutes a clear statement by the government as to the "worth" of different religious beliefs. Those who do not adhere to a religious faith that receives such public aid may perceive that they do not stand upon an equal footing with those that do so adhere, especially if support through taxes for the preferred beliefs stands as a price for belonging to the general community.⁷⁴ If government behavior compromises in any way the equal standing of an individual within the general community because of his religious belief, it necessarily compromises the freedom of the individual to choose.⁷⁵

The second element of religious liberty seeks affirmatively to protect religious beliefs from hostile or ignorant government intrusion. This element corresponds to the views attributed to Roger Williams and may be described by the metaphor of a "wall between the garden and the wilderness."⁷⁶ This view rests on the idea that both the state and the church have separate, distinct functions to perform in their relation to the individual.⁷⁷ If government in some way limits the ability of the church to perform its functions, the ultimate effect will be to limit in some way the religious liberty of the individual. This type of limita-

74. See Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 720 (1968): "[T]he ultimate fear is that government aid will, directly or indirectly, be used to influence choice of religion, not merely to enhance another's exercise. And it is this fear which causes strife and which makes use of the nonbeliever's or other-believer's taxes so galling." *Id.* See also Lupu, *supra* note 65, at 743: "The threat to equal religious liberty is now the more subtle one of cultural and political insensitivity to those who do not share the dominant Christian ethos." *Id.*

75. See Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 212: "[T]he Establishment Clause, no less than the Equal Protection Clause, is worried about the *psychic and moral affront* from discrimination, and that evil is likelier to ensue from general favoritism of religion than it is from special consideration of a distinct minority" *Id.* (emphasis added).

76. See Katz, *supra* note 13.

77. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212.

See also Kauper, *supra* note 53. Accord Note, *supra* note 61, at 1483: "Because the wall of separation should preserve two distinct sources of influence on the individual, any attempt by the state either to combine the influence of government and religion or to displace religious influence is a threat to the plurality protected by the establishment clause." *Id.*

tion might stem from direct hostility⁷⁸ or could result from the benign appropriation by government of some symbol or ritual sacred to the church for the furtherance of secular purposes.⁷⁹ Thus any government action that adversely affects the ability of a church's or religious group's efforts to perform its proper function vis-à-vis the individual represents an intrusion by the state into an area in which it has no competence to act.

The third element of religious liberty seeks to limit the potential for strife along sectarian lines and encourages broad religious pluralism. This element corresponds with the views of James Madison and acts to remove religious beliefs as matters of public debate and legislative concern.⁸⁰ A necessary corollary of the first two elements, this view requires more than the absence of any government expression of endorsement or hostility towards particular religious beliefs. It affirmatively states the necessity for equal concern and respect for all sects and individual adherents of nonconforming beliefs.⁸¹ The fundamental role that the choices in matters of religious belief play in the formation of an individual's identity necessarily precludes those beliefs from ever becoming matters to be judged by public consensus. Removing the functions of government from potential religious

78. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982) (law aimed at hindering fund-raising efforts of nonmainstream sects).

79. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of state composed prayer). Such an appropriation could severely alter the meaning inherent within the symbol or ritual that the church wishes to convey; it could strip away from an individual the significance and meaning (s)he had formerly obtained from the church. Cf. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 829 (1983):

[T]he very concept of a "nondenominational prayer" is self-contradictory. There are well over fifty different theistic sects in the United States, each of which has its own tenets regarding the appropriate nature and manner of prayer. Any effort to compose a truly nondenominational prayer must thus produce, at best, a sterile litany virtually devoid of true religious meaning.

Id. Accord Clark, *supra* note 41, at 864:

[O]ne of the lawyers in the *Schempp* case argued that "public school recitation of the Lord's Prayer is not a religious act but a mere exercise in civic morality." Professor Katz points out that the "danger" is that children might regard all prayer in this light. I would only add from my observation that rather than "a danger" the Professor has uncovered a reality.

Id.

80. See Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (1947) (app. to opinion of Rutledge, J., dissenting).

81. See Lupu, *supra* note 65.

utilization diminishes the chances for discord between competing sects, insofar as the incentive for such discord disappears.⁸²

The above three elements of the principle of religious liberty — prevention of religious influence over government, prohibition against government intrusion into religion, and avoidance of religio-political factionalism — are properly considered primarily as establishment clause values. The clause affirmatively limits the power of government to act, adhere to, or entangle itself with religious beliefs.⁸³ The doctrine of “separation of church and state” may be applied to effect any one of these three values, as the Court evidently did in *Everson*, *McCollum*, and *Zorach*. But “separation” cannot serve as an end in itself. There exists still another element to the principle of religious liberty, one equally crucial to the other three in protecting the free choice of the individual in matters of religious belief. Government may act in a manner wholly compatible with the first three elements, yet inadvertently incur the effect of infringing upon the free choice of an individual.⁸⁴ Under these narrow circumstances, if government cannot demonstrate a sufficiently compelling justification for the imposition of such a burden, the individual should be exempted from the requirements of the legislation that has caused the infringement. Such action clearly

82. See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L. J. 770, 777-78 (1984):

The Memorial and Remonstrance Against Religious Assessments, of 1785, inveighed against the risk that “the Civil Magistrate . . . may employ Religion as an engine of Civil policy,” and equally against the infusion of any particular religion within government “because it will have a like tendency to banish our Citizens,” i.e., to make them aliens to their own government. Competition among religions for position within government must be avoided so that none need fear any other, as each might otherwise seek its own establishment through government or within government.

Id.

83. Cf. *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (separate opinion of Frankfurter, J.). “The Establishment Clause *withdrew from the sphere of legitimate legislative concern and competence* a specific, but comprehensive, area of human conduct: man’s belief or disbelief in the verity of some transcendental idea and man’s expression in action of that belief or disbelief.” *Id.* (emphasis added).

84. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exemption from compulsory education laws); *Sherbert v. Verner*, 374 U.S. 398 (1963) (exemption from state unemployment benefits requirements due to Sabbatarian beliefs); *Hobbie v. Unemployment Appeals Comm’n*, 107 S. Ct. 1046 (1987) (exemption from state unemployment benefits requirements due to Sabbatarian beliefs).

cannot be squared with any concept of "separation." This element of permissible exemption may be considered primarily as the value of the free exercise clause.⁸⁵

No clear demarcation exists between the two clauses; the establishment clause and the free exercise clause together comprise the full constitutional embodiment of the principle of religious liberty.⁸⁶ Any attempt to confine a particular element of the principle to one clause or the other will ultimately produce the exact type of "tension" that has been said to exist between the two clauses. The tension, of course, cannot and does not lie between the establishment and free exercise clauses as such, but between the different elements themselves.⁸⁷ For example, the Williams element of religious liberty, the need to keep religious beliefs secure from hostile or ignorant government intrusion, may properly be said in many instances to arise equally as either an establishment or as a free exercise claim.⁸⁸ That an action undertaken pursuant to this value may conflict with the Jeffersonian⁸⁹ element does not imply a conflict between the clauses

85. A full explication of the element of "permissible exemption" requires, and regretfully must await, a complete article in itself. For a recent provocative discussion of the proper scope and application of the Free Exercise Clause and its underlying values, see Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. Rev. 391 (1987).

86. "Although a distinct jurisprudence has enveloped each [clause], their common purpose is to secure [individual] religious liberty." *Wallace v. Jaffree*, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring).

87. *See id.* at 2504:

[O]ne can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause.

Id.

88. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986) (contention that statute forbidding sex discrimination may not be applied in context of pregnant school teacher dismissed on basis of school's religious tenet requiring mothers of preschool children to remain at home with their children).

89. *See* Paulsen, *supra* note 12, at 322: "[T]he Court has not realized the full extent to which Jeffersonian 'separation' and Madisonian 'neutrality' can be at war with one another." *Id. Cf. Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding property tax exemptions for religious organizations).

No case to date has brought this potential conflict into focus as sharply as the

themselves.

Court's decision this past term in *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987). At issue was the constitutionality of section 702 of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C. § 2000e-1 (1982). Section 702 exempts from the general provisions of Title VII, "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Section 702 had been extended in 1972 beyond its original exemption, which had applied solely to religious activities. One reason for this had been to avoid having courts intrude into the internal functioning of religious organizations in order to determine whether a given activity was "religious," see *Amos*, 107 S. Ct. at 2866 n.9, an enterprise the district court in *Amos* nonetheless felt compelled to undertake, in order to weigh the constitutionality of section 702 under the establishment clause. See *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791, 799 (D. Utah 1984). For a criticism of the test utilized by the district court judge in *Amos*, see Lupu, *supra* note 85, at 392-95 n.10.

At issue in *Amos* was whether the Church of Latter Day Saints could terminate the employment of an employee in a gymnasium owned and operated by the church solely on religious grounds. The lower court held that the gymnasium, though operating on a non-profit basis, was not connected to the "religious" activities of the church and that the application of section 702 to the nonreligious activities of the church violated the establishment clause, by conferring a benefit on the church that invariably could not pass muster under the "effects" prong of the *Lemon* test.

The Supreme Court unanimously reversed; the majority opinion of Justice White, however, failed to take cognizance of the conflict of values presented by section 702. Instead, the majority mechanically applied the *Lemon* test and upheld the statute. To do so, the Court was forced to draw a highly attenuated distinction in applying the "effects" prong, stating, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 107 S. Ct. at 2869 (emphasis in original).

This once again illustrates the danger of applying a governing principle or judicial test without guidance from an accepted underlying principle. As Justice O'Connor observed in her separate concurrence, "[t]his distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply 'allowing' a religion to better advance itself" *Id.* at 2874 (O'Connor, J., concurring).

Justice Brennan addressed the conflict directly, noting that the exemption contained in section 702 "is in serious tension with our commitment to individual freedom of conscience in matters of religious belief." *Id.* at 2871 (Brennan, J., concurring) (footnote omitted). Recognizing that only by reference to a further underlying value could the tension be reconciled, he wrote:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. *Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.*

Each clause has its own proper function and scope. The establishment clause exists as a broad, specific, content-based limitation on government behavior.⁹⁰ The free exercise clause, on the other hand, serves a far narrower, though no less vital purpose. It "constitutes a unique acknowledgement of the occasional primacy of faith in an otherwise secular state."⁹¹ Fidelity to the idea of protection for the individual choice in matters of religious belief requires the avoidance of a forced choice between adherence to the dictates imposed by such beliefs and (absent a "compelling" government interest) compliance with government rules. The two clauses overlap in many ways, but each also serves a vital purpose on its own. The resolution of any tension that may exist between the different elements of the principle of religious liberty must ultimately rest with the underlying principle itself, and not by resort to "separation," the *Lemon* test, or any other articulated governing principle.⁹²

Unless we clearly understand the underlying principle sought to be effected, application of a governing principle through some test such as *Lemon* will prove a frustrating, counterintuitive exercise. The consistent application of the doctrine of "separation" could offer great clarity to this area, but would not always further the principle of religious liberty.

B. *Religious Liberty and the Values Underlying the First Amendment*

The first amendment seeks to protect the autonomy of each individual by limiting the power of government to intrude within a sphere of beliefs, ideas, and expressions. The legitimacy

Id. at 2871-72 (footnote omitted) (emphasis added). See also *id.* at 2874 (O'Connor, J., concurring).

90. See *supra* note 83.

91. Lupu, *supra* note 65, at 761.

92. See Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 815 (1978) (arguing that the Supreme Court should hold that the central value in the religion clauses "is the protection of individual choice in matters of religion, and that an expansive protection of all such choices does not constitute an impermissible establishment of religion") (emphasis omitted); *contra* Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213 (1973) (arguing that standard of strict neutrality does not permit any government classifications on the basis of religion).

of our system of government derives from a fiction of some form of individual consent. This fiction may only be maintained through explicit recognition of the autonomy of the individual in determining the choices that (s)he believes to be essential to the self-definition of his/her identity.⁹³ The concept of our government as one of limited powers mandates that our government may not, consistent with the premises on which it rests, intrude within the realm that constitutes the identity of the individual.⁹⁴ The first amendment makes explicit the role of the sphere of beliefs, ideas, and expression within the context of the relationship of the individual to the general community, and thus protects the legitimacy of our system of government by forbidding such government action that could, by its interference within the protected sphere, destroy the fiction of consent.⁹⁵

Within the sphere of beliefs, ideas, and expressions, the Framers explicitly chose to distinguish matters of religion from matters of nonreligion. For the protection of all nonreligious beliefs, ideas, and expressions, the Framers deemed it sufficient to include the speech clause alone; the individual receives the widest possible scope of protection for his/her choice of beliefs, but (s)he is not guaranteed an environment in which the state is prohibited from exerting indirect pressure on that choice, either through consensus, or some form of official government "speech." The powerful restrictions on government behavior mandated by the establishment clause apply only to matters of

93. See Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1120-25 (1979) (citing Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204 (1972)) (an analysis of the Millian principle of free expression).

94. See Wellington, *supra* note 93, at 1121-22: "[T]he First Amendment . . . is not an individual right, but a limitation on the authority of government . . . [I]t derives from the proposition 'that a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents.'" *Id.* Accord Lupu, *supra* note 65, at 772: "Compulsion of belief, designed to lure and reinforce political or religious commitment, is in direct conflict with the intellectual skepticism on which the continuing consent of the governed depends. The democratic society envisioned by the Constitution and its architects thus depends on freedom of belief." *Id.*

95. Wellington, *supra* note 93, at 1123. Nowhere has this principle found purer expression than in the subtly poetic phrasing of Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943).

religious belief. Religion differs in kind, and not just degree, from other beliefs, ideas, and expressions; the values protected by the elements of the principle of religious liberty in some ways run directly counter to other underlying principles of the first amendment.⁹⁶ Consider this distinction: for nonreligious ideas, we often seek a judgment of veracity within some comprehensible parameters; we speak of "political truths," "historical truths," "scientific truths," and the like, establishing mutable conventions through accepted criteria (usually some form of consensus), or long-standing custom and usage. The underlying principle of the speech clause requires that we accept the mutability of such "truths" and the degree of protection we accord to dissent and disagreement.⁹⁷

For religious beliefs, we eschew such notions of "truth."⁹⁸

96. *Compare* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.") with *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("Ordinarily political debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

97. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out.

Id. (emphasis added).

98. In *United Christian Scientists v. Christian Science Bd. of Directors*, No. 85-5959, slip op. (D.C. Cir. Sept. 22, 1987), the Court of Appeals of the District of Columbia held that the extension by Congress of the copyright to the works of Mary Baker Eddy "positively offends our constitutional tradition." *Id.* at 30. After finding that the copyright extension effectively prevented a dissident sect of Christian Scientists from publishing their own interpretive version of the writings of the founder of their movement, the court stated that there

is the common understanding that the domain of religious conviction is pervaded by heterogeneity of viewpoint and continuing debate over religious truth. Government is therefore barred from assuming a position in the debate by attempting to establish religious truth by fiat. In matters of religion, truth, including purity of doctrinal statement, is left for the citizenry to determine by persuasion, not for resolution by exertion of governmental authority.

Id. at 31-32 (citing *United States v. Ballard*, 322 U.S. 78 (1944) (truth or falsity of an individual's religious beliefs cannot be made the subject of a criminal trial)).

Further, once an individual has made the choices necessary to determine what (s)he believes to be "religious truth," the principle of religious liberty requires not only that the general community accept the immutability of the individual's choice, but also that no judgment of the veracity of such beliefs be expressed and that (except when required by the element of permissible exemption that underlies the free exercise clause) these beliefs be completely irrelevant to the manner in which the state chooses to interact with the individual.

IV. Applying the Principle of Religious Liberty

A. *Avoiding the Extremes*

Much of the recent debate regarding the establishment clause has focused on the proper weight that historical evidence of the Framers' intentions should receive. One viewpoint seeks to assert the "absolutist" view espoused by the Court in *Everson*⁹⁹ and the writings of Jefferson and Madison relied on by the Court therein.¹⁰⁰ The opposing viewpoint argues in favor of a "revisionist" approach.¹⁰¹ Proponents of this perspective contend that the historical record proves that the views arguably held by Jefferson and Madison differed greatly from the views of the representatives who adopted, and the people who ratified, the religion clauses along with the remaining provisions of the Bill of Rights.¹⁰² "Revisionists" have vigorously sought, in the past few years, recognition of a far narrower interpretation of the establishment clause, claiming that the true intent of the Founding Fathers was merely to prevent the establishment of a national church and the advancement or disparagement of any

99. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

100. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (Brennan, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Brennan, J., dissenting); *Wallace v. Jaffree*, 105 S. Ct. 2479, 2488 (1985). See also Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980); Drakeman, *Antidisestablishmentarianism: The Latest (and Longest) Word from the Supreme Court in Marsh v. Chambers*, 5 CARDOZO L. REV. 153 (1983).

101. See, e.g., *Lynch*, 465 U.S. at 668; *Jaffree*, 105 S. Ct. at 2508 (Rehnquist, J., dissenting). See also R. CORD, *SEPARATION OF CHURCH AND STATE* (1982); Dunsford, *Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome*, 1984 UTAH L. REV. 1 (1984).

102. See generally R. CORD, *supra* note 101.

one religion at the expense of others.¹⁰³ They argue that *Everson* and the doctrine of "separation" rest on faulty historical and legal analysis, and thus should no longer be followed.¹⁰⁴

The unfortunate aspect of this debate stems from the inability of either position to take satisfactory cognizance of the principle of religious liberty.¹⁰⁵ "Revisionists" belabor the obvious flaws inherent in the doctrine of separation;¹⁰⁶ "absolutists" steadfastly hold to the words of Jefferson and Madison.¹⁰⁷ Neither position avoids the pitfall of begging the essential question.

The failure of the "absolutist" position stems from the impossibility, as a practical matter, of such a complete separation existing in the society in which we live today. The role of the government pervades our lives to the point where no institution of society may achieve the total insulation that the "absolutist" approach requires.¹⁰⁸ The Court has recognized this fact;¹⁰⁹ it has not, however, articulated any coherent rationale for parsing out the types of involvements between state and religious institutions that are arguably permissible under the religion clauses as tolerable "acknowledgements" and those involvements that may result in "the power, prestige and financial support of government [placing] indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion. . . ."¹¹⁰

Whereas the problem with the "absolutist" position lies in

103. See *Jaffree*, 105 S. Ct. at 2508 (Rehnquist, J., dissenting).

104. See Dunsford, *supra* note 101, at 20: "As a fountainhead for doctrine, *Everson* is a polluted source. The opinion is shabby history and unacceptable legal analysis." *Id.*

105. "Each theory is incomplete — each focuses on only one value because it cannot accommodate the other, apparently irreconcilable, values protected by the clauses. Paradoxically, however, this perceived irreconcilability stems from a conception of human identity shared by all three theories." Note, *supra* note 61, at 1469 (discussing three perspectives). See Devins and Feder, *First Amendment's Religion Clauses: Balancing Two Contrasting Views*, Nat'l L.J., Nov. 25, 1985, at 24.

106. See *Lynch*, 465 U.S. at 672-73 (1984); *Jaffree*, 105 S. Ct. at 2508 (1985) (Rehnquist, J., dissenting).

107. See *Jaffree*, 105 S. Ct. at 2488-89; *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

108. See Gianella, *supra* note 69.

109. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

110. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

its overinclusiveness, the "revisionist" viewpoint leads to results that can directly contravene the principle of religious liberty and may lead the government to intrude within the sphere of beliefs, ideas, and expressions protected by the first amendment by perceptibly burdening the free choice of individuals in matters of religious belief. In *Lynch v. Donnelly*,¹¹¹ the Court upheld the inclusion of a nativity scene by a municipal government as part of an overall holiday display. The Court's holding provides an example both of the adoption of the "revisionist" perspective¹¹² and the dangers inherent in the Court's failure to proscribe certain types of church-state interaction.¹¹³

The Jeffersonian element of religious liberty protects the general community from any government-sponsored religious influence.¹¹⁴ In this instance, the municipal government closely identified itself with a symbol that contains extreme religious significance for a majority of its citizens. The message conveyed by such a union of church and state can be very powerful: while in no way disparaging any other religious beliefs, the government's action can be interpreted as a clear statement to the general community that those religious beliefs are the ones it wishes to exalt. Our representative system guarantees that when the government acts on behalf of a majority of the general community, an individual is free to accept or dissent from that decision. However, when a government act is based on matters of religious belief, the Court should not uphold such government behavior.¹¹⁵ Any action undertaken by the state that exalts the majority religious beliefs will necessarily affect the manner in which a nonadherent may relate to the general community. The fact that one may freely disregard the municipality's active involvement

111. 465 U.S. 668.

112. The "revisionist" perspective applies a governing principle of "accommodation," rather than "separation" or "neutrality." See *id.* at 673: "[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* (emphasis added).

113. See Van Alstyne, *supra* note 82, at 786 (viewing *Lynch* as part of a national trend, "a movement of gradual, secularized Christian ethnocentrism, [that] has tended to elude the establishment clause itself").

114. See *supra* text accompanying notes 70-75.

115. "To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause." *Lynch*, 465 U.S. at 709 (Brennan, J., dissenting).

with a crèche is irrelevant if such involvement results in the perception that the government is making a statement as to the relative "worth" of any form of religious belief.¹¹⁶

The Williams element of religious liberty protects religious beliefs from government intrusion.¹¹⁷ In *Lynch*, the government utilized a symbol to which holders of certain religious beliefs attach great significance. Most adherents of those beliefs probably approved of the manner in which the municipal government recognized their views. A few may have felt offended by the government's chosen manner of utilization. For some others, the city's appropriation of the religious symbol for its own avowedly secular purposes may have altered, or in some way diminished the meaning which they had previously obtained from that symbol. The state's method of appropriation, whether favorable or unfavorable to the holders of the beliefs involved, does not alter the analysis.¹¹⁸ When government deliberately chooses to involve itself in a matter of religious significance, it causes matters of religious belief to become relevant to the manner in which the individual relates to the general community. Interaction with the individual in matters of religious belief must remain the sole province of the church.¹¹⁹

116. As discussed later, government behavior that may readily be seen as pertaining to a particular set of religious beliefs presents perhaps the most egregious type of threat to the principle of religious liberty. See *infra* text accompanying notes 129-131.

117. See *supra* text accompanying notes 76-79.

118. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (Brennan, J., dissenting):

The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.

The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

Id. (emphasis added) (citation omitted).

119. See *United Christian Scientists v. Christian Science Bd. of Directors*, No. 85-5959, slip op. at 27 (D.C. Cir. Sept. 22, 1987) ("It is not the function of government to promote religious worship, to enable a religious entity to control statements of church doctrine, or to guide a 'confused' public to 'correct' religious authority."). See also Giannela, *Religious Liberty, Nonestablishment, and Doctrinal Development — Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968):

Religious voluntarism, of course, is an important aspect of the freedom of conscience guaranteed by the free exercise clause. But a broad interpretation of the

The Madisonian element of religious liberty protects the general community against strife along sectarian lines, and seeks to protect equal standing within the general community among all sects and individual adherents, by withdrawing matters of religious beliefs from the public executive and legislative forums.¹²⁰ Even absent the dangers that exist from the perception of such behavior, the utilization by government of a symbol with deep religious significance threatens religious equality, in that individuals can be made to feel more or less a part of the general community on the basis of religious beliefs.¹²¹ When matters of religious belief become the subject of public debate, a strong threat arises that the individual choice may be affected by some consensus of the general community.

establishment clause also gives vent to the social dimension of this value by restricting the use of political power in shaping the ideological and sociological forces which give social form to religion. The growth and advancement of a religious sect must come from the voluntary support of its membership. Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit. Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.

Id. (footnotes omitted).

120. See *supra* text accompanying notes 80-82.

121. Laws or practices that purport to treat equally all religions, or religion and nonreligion, must nonetheless receive careful scrutiny, in order to ensure that the benefits extended are genuinely available to all on an equal basis, and not just subject to the tastes of a particular majority. One rationale proffered in favor of the placement of religious symbols, such as nativity scenes on public property, argues that so long as the same benefit in principle extends equally to all religious groups, no constitutional infirmity exists. In practice, however, if the benefit fails to extend past the adherents of majority or mainstream religions, then the clear effect is that matters of religious belief are in some manner being affected by some consensus of the general community. Cf. *Marsh*, 463 U.S. at 822-23 (Stevens, J., dissenting):

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.

Id.

B. *A Proposed Methodology: Drawing Fine Lines*

In order to apply the principle of religious liberty in an effort to balance the competing, and sometimes conflicting, elements, courts will have to draw many fine lines. A distinction must be recognized between "acknowledgement" and "endorsement." The former term should be defined as those examples of government involvement with religion that do not violate the underlying principle of freedom of choice in matters of religious belief for each individual. How does government conduct rise to the level where it might be said to affect the individual conscience in matters of belief? The line should be drawn at action by the state that places an imprimatur of approval or disapproval upon any particular set of beliefs. Such an imprimatur represents a statement by the government to the general community as to the "truth" contained in a particular set of beliefs.¹²²

The difficulty adheres, of course, in defining such an "imprimatur." Applying the three part *Lemon* test to make this determination only begs the question. The law that mandates the printing of "In God We Trust" on all United States currency¹²³ appears to have a clear religious purpose, yet may not constitute any more than a permissible acknowledgement of religion;¹²⁴ the

122. See *supra* text accompanying notes 93-97.

123. 31 U.S.C. § 5112 (1982).

124. The questions presented by such omnipresent reminders of a deific presence in our society are difficult. Whatever the range, if any, of acceptable "acknowledgements" such as "In God We Trust," it must not be allowed to infringe the free choice of those who hold atheistic or nontheistic beliefs. "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Jaffree*, 105 S. Ct. at 2488.

Perhaps the rote repetition of such affirmations of faith ultimately dispel any government imprimatur that would otherwise be. (This, of course, raises objections as well. See *supra* text accompanying notes 117-119.) As one commentator has suggested:

Though government indeed "follows the best of our traditions" when it seeks to accommodate the religious beliefs of its people, the boundaries of such accommodation [can] extend no further than the genuine need for such accommodation.

...

Nonetheless, it must be acknowledged that certain ceremonial or traditional invocations of religion by the state may be so embedded in the community's consciousness as to negate their "suspect" character (though *not* their religious character).

Paulsen, *supra* note 12, at 342 (emphasis in original) (citations omitted).

The evil to be avoided lies in the perception that government has in some way made

placing of a crèche in a municipal Christmas display may perhaps have a clear secular purpose, but ultimately constitutes an impermissible endorsement. The answer must lie within some form of a "reasonable person" standard of perception.¹²⁵ An ad-

a statement that pertains to the "truth" contained in some matter of religious belief. The closer the interaction between the state and a particular set of beliefs, the greater the danger of such an imprimatur. Conversely, if government treats with religion in a broad, amorphous manner, the danger correspondingly decreases. See *infra* notes 130-131.

Some objective standard or criterion must lie in order to delineate between "the genuine threat" and the "mere shadow." *School Dist. of Abington v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). If no such distinction existed, then virtually any type of government behavior could, in theory, be said in some way to intrude impermissibly upon some individual's free choice in matters of religious belief. See, e.g., *Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (museum display on "The Emergence of Man" alleged to establish secular humanism as a religion); *Grove v. Mead School Dist.*, 753 F.2d 1528 (9th Cir. 1985) (assignment of *The Learning Tree* to high school literature class alleged to establish secular humanism); *Smith v. Board of School Comm'rs of Mobile County*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (district court held that home economics text books that emphasize the role of the individual in moral choices, and history textbooks that fail to emphasize the importance of religion in American history and contemporary American society, impermissibly constituted an establishment of secular humanism). By the same token, we need some basis for distinguishing between study of the Bible for historical purposes in the public classrooms, and its use as a religious exercise. Cf. *Schempp*, 374 U.S. at 225 (Bible-reading required in public schools).

Several factors may be utilized by an adjudicating court in an objective fashion and which can provide a principled and consistent basis for measuring government action that in some way affects religion against the different elements of the principle of religious liberty. See *infra* text accompanying notes 126-137.

125. Defining the "reasonable person," or, to borrow Justice O'Connor's terminology, the "objective observer," see *infra* text accompanying notes 154-157, raises severe questions of its own. Perhaps no criteria for resolving problems concerning church-state law could ever be truly objective; on the other hand, criminal and tort law within Anglo-American jurisprudence presuppose just such a measurement for human behavior and perception. As Professor Fletcher has written:

We lawyers should listen to the way we talk One of the most striking particularities of our discourse is its pervasive reliance on the term "reasonable."

We routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care Within these idioms pulse the sensibilities of the reasonable person. For all the supposed concreteness of the common law, we can hardly function without this hypothetical figure at the center of legal debate.

Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985).

Recall the debate between Justice Frankfurter and Professor Kurland in *supra* note 27, and accompanying text. Reliance on a governing principle, such as Professor Kurland's "strict neutrality," will help achieve clarity and predictability, but sacrifices adherence to the underlying normative value. Consistent adherence to the normative value produces the opposite result. The "reasonable person" methodology works only with the latter approach. As Professor Fletcher notes:

[N]o set of rules can determine what is reasonable in all situations. Nor does rea-

judicating court must take careful measure of all the relevant facts, while keeping foremost in mind the underlying principle to be effectuated.

A court should at least consider the following:

1) The form of the aid involved — is the religious institution receiving a specifically legislated grant, or is it merely accepting a benefit commensurate with its status as a part of the general community?¹²⁶ Whenever government accords a special benefit to religion, the conclusion that government is making a statement as to the worth of a particular set of religious beliefs becomes more reasonable to draw.¹²⁷

sonableness lend itself to definitive specification on the basis of custom We do not always know what the reasonable person requires, but working with this open-ended concept at the core of our legal system saves us from the constricting effects of positivism.

Id. at 930.

A criterion of reasonability, such as outlined below, can exist only if the underlying principle of religious liberty is generally recognized and accepted. Otherwise, the factors listed can provide no more guidance than any other governing principle, such as "separation." Justice O'Connor explicitly addressed this concern in her concurrence in *Jaffree*, in her discussion of the apparent "tension" between the two clauses. *See supra* note 89.

In assessing the effect of [a statute that seeks to facilitate the free exercise of religion by lifting a government imposed burden] — that is, in determining whether the statute conveys the message of government endorsement of religion or a particular religious belief — courts should assume that "the objective observer" [is] acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

Jaffree, 105 S. Ct. at 2504 (O'Connor, J., concurring).

126. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 675-76 (1970):

The grant of a tax exemption is not sponsorship No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state

Separation . . . cannot mean absence of all contact; the complexities of modern life inevitably produce [the same] incidental benefits accorded all persons or institutions within a State's boundaries

Id. Accord *Clark*, *supra* note 60, at 461: "I think that the Court is concerned with the extent to which the religious benefit is traditional, on the one hand, or whether, on the other hand, granting the benefit *changes the status quo* apparently for the purpose of benefiting religion." *Id.* (emphasis added). *Cf. United Christian Scientists v. Christian Science Bd. of Directors*, No. 85-5959, slip op. at 20 (D.C. Cir. Sept. 22, 1987) ("Where, as here, government has bestowed a significant benefit upon a single religious denomination, we embark on this mission [of determining the legislative purpose] with special care.").

127. *See Gianella*, *supra* note 119, at 517-18:

[G]overnmental preference of a particular religion, or even of religion in general

2) Necessity — a form of coinvolvement permissible under exigent circumstances might well devolve into a perception of impermissible endorsement if it were to become part of the status quo. The necessity that triggers the interaction between the state and religion must be carefully weighed. State action required under particular circumstances should not imply an imprimatur of approval or disapproval.¹²⁸

3) Identification with a particular set of religious beliefs — presence of this factor should require the adjudicating court to place an onerous burden upon those seeking to defend the church-state interaction. As with the form of aid involved, the more specific the government behavior, the greater the chance that a reasonable individual will perceive some form of a message.¹²⁹ Conversely, when government treats "religion"¹³⁰ in

over irreligion, gives rise to an advantage which is clearly inconsistent with voluntarism and will surely breed political dissension. . . . [A]pplication of government funds to religious purposes suffers from these twin evils because each citizen is taxed to support the religion of others; but this proposition of fiscal noninvolvement with religion is subject to exceptions. . . . Where the state does no more than extend to religion the benefits of the prevailing social order, it does not lend the kind of support forbidden by the principle of voluntarism.

Id.

128. The government expenses and aid necessary to accommodate the 1979 and 1987 visits of Pope John Paul II demonstrates that even an extensive church-state interaction will, under certain circumstances, raise little danger that a perception of state approval will arise. See *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (plaintiffs challenged expenditure of \$200,000 by city on the erection of a special stage and altar for the Papal Mass, but not the over \$1,000,000 spent on security and crowd control). Cf. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (permanent vesting of sovereign power in religious institution held unconstitutional).

129. See *Stone v. Graham*, 449 U.S. 39 (1980) (state may not post the Ten Commandments in public school classrooms). Accord *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). See also *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914, 2918 (1985); *id.* at 2919 (O'Connor, J., concurring).

130. See, e.g., *United States v. Seeger*, 380 U.S. 163, 165-66 (1965). The Court chose to construe the words "an individual's belief in a relation to a Supreme Being," in the congressional statute providing for conscientious objector exemptions from military service, in the broadest sense those words could be interpreted in order to uphold the constitutionality of the statute. The Court wrote that one could qualify for a "religious" exemption if

a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives

a broad, amorphous manner, the likelihood that a reasonable individual will conclude that such behavior is an endorsement of or hostility towards any particular set of religious beliefs diminishes.¹³¹

4) Degree of coinvolvement — religious institutions and organizations perform a wide range of secular and sectarian functions, and must necessarily interact and cooperate with institutions of the state. But when the coinvolvement vests in the institutions of religion certain powers that abide in the state,¹³² or when government officials act in a religious capacity,¹³³ or when the state purports to use religious means, even to achieve secular ends,¹³⁴ a reasonable person will be more likely to draw a particular conclusion as to the state's views towards a specific religion.¹³⁵

5) Context — the time, place, and manner of the coinvolvement or type of aid must weigh heavily in the final analysis.¹³⁶ A religious icon or painting displayed in a public museum, for example, will almost certainly send forth a far different message than would the display of the same object in a government building or on government property. State action which is per-

of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Id. at 166.

For the purposes of this paper, this interpretation is sufficiently broad. *See supra* text accompanying notes 65-66. For a criticism of this definition, *see* Choper, *supra* note 66, at 594-97.

131. Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982), constitutes a permissible government treatment of religion. The statute prohibits religious employment discrimination, and requires that employers "reasonably accommodate" the religious needs of their employees. 42 U.S.C. § 2000e-1(j). The Equal Employment Opportunity Commission has specifically adopted the interpretation used by the Court in *Seeger*, 380 U.S. 163, and has held this definition to be broad enough to encompass even atheistic beliefs. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

132. *See Illinois ex rel McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (control of public school classrooms).

133. *See Edwards v. Aguilard*, 107 S. Ct. 2573 (1987) (state law requiring "creation-science" to be taught in public schools equally with evolutionism).

134. *See School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

135. *See Larkin* 459 U.S. at 125-26: "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* (emphasis added).

136. *See, e.g., Lynch*, 465 U.S. 668.

missible when directed towards adults often becomes suspect when directed towards impressionable children.¹³⁷

In sum, courts will have to draw fine lines, but the task becomes possible once a clearly understood principle is articulated. When deciding cases under the establishment clause, courts must proscribe any government behavior that, through sponsorship or approval of religion, through disapproval of or intrusion within the proper sphere of religion, or through the creation of sectarian factionalism, affects the free choice of individuals in matters of religious belief. Making the leap of understanding from the philosophically abstract notion of protecting free choice in matters of religious belief, in order to maintain the autonomy of the identity of each individual, to the facts of each particular case does not provide quick answers, but it will perhaps provide the right ones — “right” in the sense of permitting a principled application of the constitutional language, allowing a consistent harmony among different constitutional provisions, and providing genuine substance and logical meaning to the clauses themselves.

V. The Recent Cases and Justice O'Connor's Approach

The Supreme Court decided four establishment clause cases during the 1984-1985 term.¹³⁸ The tendency towards reliance

137. Compare *Marsh*, 463 U.S. 783 (legislative chaplains held constitutional) with *Engel*, 370 U.S. 421 (school prayer case).

138. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

The Court decided five religion clause cases during the 1985-1986 term. The Court disposed of two cases, *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326 (1986) and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986) without reaching the merits. Two other cases, *Witters v. Washington Dep't of Services for the Blind*, 106 S. Ct. 748, *reh'g denied*, 106 S. Ct. 1485 (1986) and *Bowen v. Roy*, 106 S. Ct. 2147 (1986), provided results that are consistent with the analysis suggested in this Article. In *Witters*, the Court held that the establishment clause did not bar a blind person's decision to utilize state rehabilitation payments for religious training. The Court considered the form of the benefit (payment to an individual for whatever type of education he wished to seek), the necessity provoking the benefit (training for useful career in spite of handicap), and the complete lack of identification with any particular form of religious beliefs, or even with religion in general over nonreligion. The Court also noted the lack of any involvement between agents of the state and of the benefited religious institution (at least on the record as it came before the Court, see 106 S. Ct. at 751 n.3), and the particular context in which this aid was dispensed, received, and utilized by one

upon governing principles ("neutrality," the *Lemon* test) runs strong through each. There appears as well, however, a clear trend towards the articulation of a normative underlying principle of religious liberty, and an application of the relevant governing principles in a manner intended to achieve that end. The influence behind this trend stems largely from Justice O'Connor: she alone offered a separate opinion in each of the four cases, and the majority opinions in two of the cases openly acknowledge the persuasiveness of her arguments.¹³⁹ But both she and the majority have left much unstated, and there remain crucial problems in the Court's current analysis that must be addressed if a coherent, workable normative principle of religious liberty is ever to be settled. The Court will otherwise drift back to its dangerous vacillation between the "absolutist" and the "revisionist"

individual. Justice O'Connor succinctly stated the necessary legal conclusion: "No reasonable observer is likely to draw from the facts before us an inference that the state itself is endorsing a religious practice or belief." *Id.* at 755 (O'Connor, J., concurring).

In *Bowen*, the Court held that the free exercise clause did not provide an individual the right to direct the manner in which the government could utilize information in its possession, and thus denied a father's request that his daughter be exempted from the Department of Health and Human Services' requirement that her Social Security number be used for the purpose of processing claims for welfare benefits. His objection was based on sincere religious reasons. A majority of the Court, however, *see* 106 S. Ct. at 2158-60 (Blackmun, J., concurring); *id.* at 2164-69 (O'Connor, J., joined by Brennan and Marshall, J.J., concurring in part and dissenting in part); *id.* at 2169 (White, J., dissenting), would hold that the government could not deny an individual's request for welfare benefits for refusing, on the basis of sincere religious convictions, to *provide* a Social Security number upon request, absent a showing by the government of a compelling interest and least restrictive means.

The Court erred badly, in this author's opinion, in disallowing the free exercise claim presented in *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986). The majority in *Goldman* simply chose to exercise a form of minimal scrutiny in weighing the petitioner's claim that military dress regulations, insofar as they prevented him from wearing a yarmulke indoors while on duty, were unconstitutional as applied. "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 1313. If by this the Court meant only that a "compelling" interest, while accepted where asserted by the military to justify an infringement of a constitutional right, might not be accepted if proffered by a civilian agency, then the proposition would be unarguable. The Court, however, made no effort to measure the Air Force's claimed interest in maintaining uniformity of dress in any way at all. As Justice O'Connor stated in her dissent, "[The free exercise] test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending." *Id.* at 1325 (O'Connor, J., dissenting).

139. *Jaffree*, 105 S. Ct. at 2490 n.42; *Ball*, 105 S. Ct. at 3226.

positions, with the attendant consequences.¹⁴⁰

The majority opinion in *Lynch* focused primarily upon the discreditation of one historical perspective, the "absolutist," and its accompanying governing principle, "separation," in favor of the "revisionist" historical perspective, and its own governing principle of "accommodation."¹⁴¹ According to *Lynch*, a state could permissibly accommodate religion, so long as 1) there existed no intent to exalt any particular set of religious beliefs, and 2) no hostility towards any set of religious beliefs was displayed.¹⁴² The majority applied the *Lemon* test,¹⁴³ plausibly concluding that the municipal government had a secular purpose and that there existed no excessive entanglement in the inclusion of a crèche in its Christmas exhibition. The finding of a primary effect that "neither advances nor inhibits religion" was somewhat disingenuous, however. The majority relied heavily upon the results of *Everson*, *McGowan*, and *Walz* as instances of permissible state support for religion¹⁴⁴ and argued that the display of a crèche could be analogized. Justice O'Connor's concurring opinion displayed a conceptually sounder approach by acknowledging the need to reference the governing principles of separation and neutrality in the *Lemon* test to some type of recognized underlying value. Her conclusion, however, cannot easily be squared with the premises she set down for weighing the constitutionality of the crèche.

Justice O'Connor succinctly outlined two elements for an underlying principle for the establishment clause. The first corresponds to the "Madisonian" element — the state should avoid "foster[ing] the creation of political constituencies defined along religious lines."¹⁴⁵ The second element she identified essentially combines the "Jeffersonian" and the "Williams" elements — the state must avoid "endorsement or disapproval" of religious beliefs. "*Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that*

140. See *supra* text accompanying notes 99-103.

141. *Lynch v. Donnelly*, 465 U.S. 668, 672-78 (1984).

142. *Id.* at 673.

143. *Id.* at 679-85.

144. *Id.* at 680-82.

145. *Id.* at 688 (O'Connor, J., concurring).

they are insiders, favored members of the political community. Disapproval sends the opposite message."¹⁴⁶ Her analysis of the facts in *Lynch* essentially concentrated on this second element.

Justice O'Connor concluded that the display of the crèche was not intended as and would not be perceived as government endorsement of the beliefs symbolized.¹⁴⁷ Her syllogism apparently ran thus: 1) Christmas is celebrated as a national holiday and contains many secular aspects and traditions. 2) Public celebration of the national holiday is not impermissible. 3) The crèche is a traditional symbol of the holiday. Therefore, "[t]he display of the crèche [serves] a secular purpose — celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion."¹⁴⁸

Justice O'Connor's reasoning in *Lynch* contains a serious flaw. Assuming *arguendo* that the celebration of Christmas as a public holiday is permissible because, like the Sunday Closing laws, government wants to provide a common "holiday season," the benefits of this season extend to all, regardless of religious beliefs. The coincidence of this holiday season with a particular religious holiday does not necessarily render the government purpose invalid. The government must be very careful, however, to avoid conveying the type of "endorsement" which might place a burden upon the free choice of individuals in matters of religious belief. If, indeed, the designation of Christmas as a national holiday is permissible, it presumably is permissible that the government may celebrate those aspects of the holiday that permit its designation: the giving of gifts, the fostering of a spirit of peace and goodwill, the spirit of renewal and hope. These aspects of the holiday are permissible matters of government behavior, since these are benefits which may extend equally to all regardless of religious belief.¹⁴⁹

However, the inclusion of a crèche in a Christmas display cannot be justified on the same grounds as Santa and elves and reindeer. The crèche conveys a message, a benefit, which does

146. *Id.* (emphasis added).

147. *Id.* at 693.

148. *Id.* at 693 (O'Connor, J., concurring).

149. *But see* DICKENS, A CHRISTMAS CAROL (1851).

not extend equally to all, regardless of religious belief. As Justice O'Connor correctly notes, "the religious and indeed sectarian significance of the crèche [is] not neutralized by the setting"¹⁵⁰ Thus, under the test she sets out, the display of the crèche clearly violates the underlying principles of the establishment clause which she has identified.

Justice O'Connor applied this same analysis to the "moment of silence" that was at issue in *Wallace v. Jaffree*¹⁵¹ and this time followed her premises to reach a different conclusion.¹⁵² The "endorsement or disapproval" test provides a sound basis for distinguishing permissible church-state interaction from those involvements that infringe the principle of religious liberty, and the majority in *Jaffree* specifically incorporated it into its application of the *Lemon* test.¹⁵³ The majority would have done better, however, had it adopted as well the method of examination utilized by Justice O'Connor in her separate opinion.

The soundness of Justice O'Connor's basic approach lies both in the logical fit that exists between the underlying principle sought and the governing principles utilized to attain that end, and the relative ease with which an adjudicating court may apply those principles. She states her normative principle clearly: "[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."¹⁵⁴ She articulates the behavior by government that violates this principle: "excessive entanglement with religious institutions . . . [that] foster[s] the creation of political constituencies along religious lines"¹⁵⁵ and "endorsement or disapproval."¹⁵⁶ Finally, and most importantly, she creates a basic framework for determining the existence of evils to be avoided. In the context of the Alabama "moment of silence" law, she

150. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

151. 105 S. Ct. 2479 (1985).

152. *Id.* at 2496 (O'Connor, J., concurring).

153. *Jaffree*, 105 S. Ct. at 2490.

154. *Id.* at 2497 (O'Connor, J., concurring).

155. Justice O'Connor stated this formulation of the entanglement prong in *Lynch*, 465 U.S. at 637-88 (O'Connor, J., concurring), but emphasized her view that it should be narrowly construed to prohibit only "institutional entanglement." See *Felton*, 105 S. Ct. at 3247 (O'Connor, J., dissenting).

156. *Lynch*, 465 U.S. at 688.

stated, "[t]he relevant issue is whether *an objective observer*, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."¹⁵⁷

The majority in *Jaffree* adopted the "endorsement or disapproval" test, but failed to embrace the other aspects of Justice O'Connor's methodology. Justice Stevens' majority opinion addressed the individual freedom to believe or disbelieve which is protected by the first amendment,¹⁵⁸ but failed both to draw a satisfactory connection between government endorsement of religion and the abridgment of that right, and to state the proper manner by which a lower court might determine the existence of such endorsement (or disapproval). The Court in this instance relied upon a close examination of the legislative history in order to fix upon the "purpose" of the government behavior.¹⁵⁹ Although this was perhaps an appropriate method given the circumstances of this particular case, it would not be proper in most others. The majority finally concluded that "[s]uch an endorsement is not consistent with the established principle that the Government must pursue a course of *complete neutrality* toward religion,"¹⁶⁰ but failed to establish the necessary nexus between "complete neutrality" and the principle of religious liberty.

The wisdom of Justice O'Connor's approach may be discerned as well in her concurring opinion in *Estate of Thornton v. Caldor, Inc.*¹⁶¹ The Court, in *Caldor*, struck down a Connecticut labor statute that granted Sabbath workers "an absolute and unqualified right" to refrain from work on their Sabbath.¹⁶² In a short, terse opinion, the majority invalidated the statute on the ground that it imposed a rigid duty upon employers to conform to their employees' religious predilections.¹⁶³

Implicit in the Court's reasoning was the inference that a less rigid statute might well pass constitutional muster, but

157. *Jaffree*, 105 S. Ct. at 2501 (O'Connor, J., concurring) (emphasis added).

158. *Id.* at 2488.

159. *Id.* at 2490-91.

160. *Id.* at 2492 (emphasis added).

161. 105 S. Ct. 2914 (1985).

162. *Id.* at 2918.

163. *Id.* at 2917-18.

nothing in the Court's analysis provided any clues as to why this might be. If the defect in the Connecticut statute was that it primarily advanced religion, why should a statute, such as Title VII,¹⁶⁴ that requires employers to accommodate, within reason, the religious practices of their employees be any less infirm? The difference lies in the perception of a reasonable person, or in Justice O'Connor's phrase, "an objective observer."¹⁶⁵ According to Justice O'Connor, this observer should realize two crucial distinctions between Connecticut's labor statute and Title VII. The first, as noted, lies in the qualifying language of the federal statute that requires only "reasonable accommodation" from the employer, who may be exempted if the accommodation would cause "undue hardship."¹⁶⁶ The second, more crucial distinction lies in the reach of the two statutes. Connecticut's statute applied on its face only to adherents of Sabbatarian beliefs.¹⁶⁷ By this limitation, the state identified itself with a particular set of religious beliefs. A reasonable person could perceive from this limitation some message from the state as to the "worth" or "truth" contained in those beliefs.¹⁶⁸ Title VII, on the other hand, seeks only to prevent discrimination on the basis of any and *all* religious beliefs, along with discrimination based upon race, color, and sex.¹⁶⁹ So long as the term "religion" is read broadly enough,¹⁷⁰ no reasonable person should understand the statute to convey a message of endorsement. As Justice O'Connor pointed out, religious beliefs are accorded no special benefit, but are treated similarly to other suspect classifica-

164. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

165. *Jaffree*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

166. 42 U.S.C. § 2000e-1(j)(1).

167. CONN. GEN. STAT. ANN. § 53-303e(b) (West 1985).

168.

The statute singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that *an objective observer* or the public at large would perceive this statutory scheme precisely as the Court does today The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.

Estate of Thornton, 105 S. Ct. at 2919 (O'Connor, J., concurring) (emphasis added). Cf. *United Christian Scientists v. Christian Science Bd. of Directors*, No. 85-5959 (D.C. Cir. Sept. 22, 1987) (discussed *supra* note 98).

169. 42 U.S.C. § 2000e-2(a)(1).

170. See *supra* notes 130-131.

tions.¹⁷¹ Because an "objective observer" should understand the distinction between a law that seeks to end employment discrimination and a law that seeks to allow certain citizens to practice their religion at the expense of other citizens, and if the effect of these different perceptions on the objective observer is clearly comprehended,¹⁷² a basis for distinguishing between the two statutes, stemming from the principle of religious liberty, now exists.

The two cases involving public aid to private sectarian schools, *Grand Rapids School District v. Ball*¹⁷³ and *Aguilar v. Felton*,¹⁷⁴ decided together by the Court in the 1984-1985 term, both demonstrate the Court's need to achieve greater analytical clarity. The area raises too many sensitive issues, and directly affects more individuals than do most of the Court's decisions within establishment clause jurisprudence. The prior case law in this area provides no clear guidance.¹⁷⁵ The majority opinions in *Ball* and *Felton* both fell short of sufficiently structuring a direct link between the facts of each particular case and the infringement of the normative underlying principle of religious liberty. Even Justice O'Connor's "endorsement or disapproval" test requires further expansion before it may be effectively applied to the questions raised by this form of government interaction with religion.

At issue in *Ball* were two programs directed by the School District of the City of Grand Rapids. The Community Education program entailed an arrangement whereby the school district "leased" space from private sectarian schools. Classes in secular subjects were taught after regular school hours by part-time public school employees, who were in almost every instance

171.

Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe *an objective observer would perceive* it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

Estate of Thornton, 105 S. Ct. at 2919 (O'Connor, J., concurring) (emphasis added).

172. For a discussion of the principle of religious liberty, see *supra* text accompanying notes 61-97.

173. 105 S. Ct. 3216 (1985).

174. 105 S. Ct. 3232 (1985).

175. See *supra* text accompanying notes 57-60.

full-time employees of the institution from which the space was leased.¹⁷⁶ The Shared Time program also involved a lease arrangement. Full-time employees of the public school entered the parochial schools in order to offer supplementary courses in secular subjects during the regular school day, within the space that had been leased by public schools. In *Felton*, the dispute arose over a portion of title I of the Elementary and Secondary Education Act of 1965, designed to provide remedial educational services to children of low-income families. The program included children in parochial schools and thus had the same features as the Grand Rapids Shared Time program — public school teachers entered the parochial schools to provide assistance in secular subjects.¹⁷⁷ The Court, in both cases, affirmed lower court rulings that held these programs unconstitutional.¹⁷⁸

The majority in *Ball* strongly affirmed its reliance upon the tripartite *Lemon* test¹⁷⁹ and then cited three different ways in which the programs under scrutiny produced a primary effect that advanced religion. The first concern of the Court was that the teachers participating in the programs might either “intentionally or inadvertently [inculcate] particular religious tenets or beliefs.”¹⁸⁰ The Court also expressed concern that the interaction between the government and the religious institution might create a perception of “[a symbolic] union between church and state.”¹⁸¹ Finally, the Court held that the type of aid provided amounted to a direct subsidy of “the primary religious mission of the institutions affected.”¹⁸²

The second of these stated effects, the “symbolic union,” restates Justice O’Connor’s “endorsement or disapproval” test.¹⁸³ The Court reasoned that the appearance of a joint enterprise between the church and the state would convey a message, particularly to the children in the midst of this interaction, of govern-

176. *Ball*, 105 S. Ct. at 3224.

177. *Felton*, 105 S. Ct. at 3236.

178. *Ball*, 105 S. Ct. at 3231; *Felton*, 105 S. Ct. at 3239.

179. *Ball*, 105 S. Ct. at 3223.

180. *Id.*

181. *Id.* at 3226.

182. *Id.* at 3224.

183. *Id.* at 3226.

ment endorsement of the religious beliefs involved.¹⁸⁴ The Court did not mention the "objective observer," however, nor state the exact types of joint behavior that would give rise to this perception. The Court's argument would have been sounder had it not stated its other two concerns as separate "effects" of the two programs, but instead used those findings to bolster its conclusion of a resulting symbolic union.

The Court's prior case law in this area is rife with seemingly contradictory holdings.¹⁸⁵ This stems from the Court's attempts to equate qualitatively different types of aid as arguments on behalf of permissibility or impermissibility in any one case.¹⁸⁶ The "endorsement or disapproval" test adopted by the Court in *Ball*, while providing a conceptually sounder link between the harm to the individual and the normative principle to be upheld than do the governing principles of separation or neutrality, will nonetheless suffer from the same defects as the Court's previous analyses unless the Court makes explicit exactly why certain forms of government action may lead the objective observer to perceive a message of government endorsement or disapproval.

The Court's first stated concern in *Ball* was that public funds might be paid directly to teachers who were inculcating religious dogma to children.¹⁸⁷ Such action would amount to a

184. *Id.* See also *Larken v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

185. A state may, for example, permissibly provide bus transportation for students to and from sectarian schools, *Everson*, 330 U.S. 1 (1947) but may not provide bus transportation for class field trips, *Wolman v. Walter*, 433 U.S. 229 (1977). A state may provide such a school with textbooks on secular subjects, *Board of Educ. v. Allen*, 392 U.S. 236 (1968), but may not provide such learning devices as maps, globes and film projectors, *Meek v. Pittenger*, 421 U.S. 349 (1975). A state may provide diagnostic services within a sectarian school building, *Wolman*, 433 U.S. 229, but the therapeutic services required as a result of such diagnostic tests, e.g., hearing and speech therapy must take place off-premises. *Id.* Accord *Jaffree*, 105 S. Ct. at 2519 (Rehnquist, J., dissenting).

186. Cf. Schwarz, *supra* note 74, at 702-04:

The root defect of the balancing technique stated in . . . [Schempp] is its failure clearly to identify and analyze the evil resulting from an aid to or advancement of religion. . . . In the absence of [such] analysis . . . it is impossible to balance intelligently a secular against a religious effect; consequently the standard neither explains nor predicts the results it reaches.

. . . [This standard] inevitably equates qualitatively different aids to religion and results in chaotically inconsistent applications.

Id. (emphasis added).

187. *Ball*, 105 S. Ct. at 3224.

direct government subsidy of religion. A reasonable person would almost certainly conclude that such a direct subsidy was a government endorsement of the religion receiving the aid and/or a disapproval of those religions not so benefitting. But is the concern itself one that reasonable persons might possess? Would an "objective observer, acquainted with the text, legislative history, and implementation of the statute,"¹⁸⁸ share the Court's fears concerning proselytism? The concern appears far more realistic for the Community Education program than for the Shared Time program.

The Community Education teachers were, overwhelmingly, full-time teachers in the same parochial schools in which they taught the Community Education classes, teaching the same students whom they had taught during regular school hours. The Shared Time teachers, however, were full-time public school employees who entered the parochial schools to teach secular subjects. There exists little reason to believe that a nonsectarian teacher will, by sole virtue of entering a parochial school, either by design or by accident, impart any religious values to his/her charges. The conveyance of a message of government endorsement or disapproval to a reasonable person, due to this concern over direct state subsidization of religion, appears reasonable for the Community Education program, where the money goes directly to full-time parochial school teachers, but not for the Shared Time program, where the money goes directly to public school employees. The existence of a "symbolic union" arising from the Shared Time program must rest upon other grounds.

The third concern articulated by the *Ball* majority lay in the fear that public funds were subsidizing the religious mission of the recipient sectarian institutions.¹⁸⁹ Again, the question turns on whether an objective observer would view aid in the form of public school teachers, teaching only secular subjects that supplemented the core curriculum of the parochial schools, as such a direct subsidization (and hence, as a message of endorsement). The *Ball* majority confidently stated, "[t]his kind of direct aid to the educational function of the religious school is

188. *Jaffree*, 105 S. Ct. at 2501 (O'Connor, J., concurring) (emphasis added). See *supra* text accompanying note 157.

189. *Ball*, 105 S. Ct. at 3228.

indistinguishable from the provision for a direct cash subsidy to the religious school"¹⁹⁰ In *Felton*, however, the Court found no such effect arising from a federal program almost identical to Grand Rapids' Shared Time program. Instead, the *Felton* Court relied upon the "excessive entanglements" prong of the *Lemon* test to invalidate the program.¹⁹¹ The majority held that the monitoring system devised by the City of New York to ensure that no publicly paid employees advanced or denigrated any religious beliefs involved too excessive a degree of church-state interaction.¹⁹²

In both *Ball* and *Felton*, the majority reviewed the precedents in the area of public aid to parochial schools and attempted to derive a principled basis from those precedents for invalidating the programs at issue. In *Ball*, the Court sought to distinguish between impermissible forms of aid "that provide 'direct and substantial advancement of the sectarian enterprise' "¹⁹³ and permissible forms of aid where "the government has used primarily secular means to accomplish a primarily secular end"¹⁹⁴ The distinctions are not satisfactory; to state them only begs the conclusion. The "indirect aid" of textbooks loaned free of charge to nonpublic school students, for example, held permissible in *Board of Education v. Allen*,¹⁹⁵ appears to serve far more directly the primary educational function of the beneficiary sectarian schools, than the "direct" aid of reimbursement for repair expenses invalidated in *Committee for Public Education v. Nyquist*.¹⁹⁶ In practical application, the "direct-indirect" dichotomy has failed to bring either coherency or predictability to this area.¹⁹⁷

190. *Id.* at 3229.

191. *Felton*, 105 S. Ct. at 3237.

192. *Id.*

193. *Ball*, 105 S. Ct. at 3228 (quoting *Wolman*, 433 U.S. at 250).

194. *Id.* at 3228.

195. 392 U.S. 236 (1968).

196. 413 U.S. 756 (1973).

197. See Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 95-96: "If the underlying value secured by Establishment Clause limitations on governmental involvement with religious enterprises is the avoidance of religio-political strife, then it is clear that the . . . direct-indirect approach sacrifices substance to form." *Id.*

VI. The Practical Application

Justice O'Connor's "endorsement or disapproval" test, applied through the "objective observer" analysis, may be able to provide the proper basis for separating the forms of benefits that infringe the underlying principle of religious liberty from those that do not.

The following method should be utilized. If the Court wishes to continue its adherence to the three-pronged test of *Lemon*, it should, as it did in *Ball*, apply the test in accordance with Justice O'Connor's analysis in *Lynch*: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether . . . the practice under view in fact conveys a message of endorsement or disapproval."¹⁹⁸ The Court must base its findings of "endorsement or disapproval" on the perception of "an objective observer," and the perception of the "objective observer" should be derived from a close examination of the benefit received by the sectarian institution. The examination should approximate the one suggested earlier;¹⁹⁹ the Court should consider the form of the challenged aid, the necessity that the benefit seeks to address, whether the benefit closely identifies the government with any particular set of religious beliefs, the degree of coinvolvement between religious and government institutions that the benefit requires, and the particular context in which the church-state interaction actually occurs. These factors should be weighed and balanced with a mind towards avoiding the perception that public funds are being used to help parochial schools in their *core function of sectarian education*. Such a perception will infringe upon one of the three elements of the principle of religious liberty that underlie the establishment clause.²⁰⁰ This results in the evil of state behavior affecting the relationship between the individual objective observer and the general community on the basis of religion, which implicates the free choice of the individual in matters of religious belief.

The analysis now shifts towards determining the "core function of sectarian education." Consider three forms of public ben-

198. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

199. See *supra* text accompanying notes 126-137.

200. See *supra* text accompanying notes 61-97.

efits already held permissible by the Court: bus transportation,²⁰¹ diagnostic services,²⁰² and secular textbooks.²⁰³ In each case, the aid took the form of a specific service or item, rather than a cash subsidy; this would argue for permissibility.²⁰⁴ The necessity that the benefits sought to address, however, are quite different. Bus transportation and diagnostic services respond to concerns over the safety and welfare of children. The secular textbooks directly respond to the educational needs of the child *within the classroom itself*. The teaching of secular subjects clearly stands as one of the core functions of a sectarian education.

There appears no basis for discerning an identification with any particular set of religious beliefs from any of these types of benefits, assuming of course that they were disbursed in an evenhanded fashion.²⁰⁵ Nor did any of these benefits require any excessive degree of coinvolvement between religious and governmental institutions. Examining the particular context, however, again shows a crucial distinction. The important question for the objective observer is: *could* this particular aid be utilized by a sectarian school in its advancement of religious dogma? The context in which the benefit is given and received will often prove dispositive. In these examples, there appears little chance, based on the above criteria, that an objective observer would view a bus or a diagnostic test as likely to inculcate any religious doctrine to the recipient children. A secular textbook, however, is used in the classroom itself. As stated above, secular education is as much a core function of the parochial school as sectarian education.

The sectarian and the secular aspects of religious education are not entirely severable.²⁰⁶ It is not unreasonable to believe

201. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

202. *Wolman v. Walter*, 433 U.S. 229 (1977).

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

204. *Cf. Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3228 (1985): "With but one exception, our cases have struck down attempts by States to make payments out of public tax dollars directly to primary or secondary religious educational institutions." *Id.* (citations omitted).

205. This can be a highly problematic assumption. See Lupu, *supra* note 65, at 752: "Aid to religious schools [has] tended to favor those religious traditions with national, hierarchical structures." *Id.*

206. *Cf. Ball*, 105 S. Ct. at 3227: "[T]he parochial school's total operation serves to

that in the context of a parochial school classroom, a secular textbook will be used to advance more than secular knowledge.²⁰⁷ When the context in which the government benefit is received and utilized by the parochial school creates a perception that the state and the church are joined as partners in the educational process, even if only in the secular aspect of the parochial school education, the Court should proscribe the government behavior that creates this perception, insofar as it conveys a message of government endorsement of religious beliefs.²⁰⁸ Given the above analysis, the Court appears to have been correct in upholding bus transportation and diagnostic services, and incorrect when it failed to disallow the loan of secular textbooks.

This argument for impermissibility applies with far greater force to the Shared Time program in *Ball*. There exists a far greater degree of coinvolvement between the church and the state in the loan of teachers than in the loan of textbooks. In *Ball*, the religious institutions and the municipal government worked together to advance one of the core functions of secta-

fulfill both secular and religious functions concurrently, and *the two cannot be completely separated*. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality of the young student." *Id.* (quoting Gianella, *supra* note 119, at 574) (emphasis added).

207. Cf. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1682-83 (1969):

[Everson stated that] a general safety measure could be applied for the benefit of the community — indeed might have to be so applied — irrespective of the religious or non-religious character of the beneficiaries. . . . The same principle would, in my view, support free medical examinations or hot lunches for all schoolchildren, wherever they might be found. . . .

Now buses and nurses and lunches are not ideological; they are atmospherically indifferent on the score of religion. Can the same be said of textbooks chosen by a parochial school for compulsory use, interpreted with the authority of teachers selected by that school, and employed in an atmosphere deliberately designed through sacred symbol to maintain a religiously reverent attitude?

Id.

208. See Kirby, *supra* note 59, at 571:

It may be conceded that the primary purposes of legislative supporters of lower school aid are to help preserve parochial schools as providers of secular education. To accept such schools as satisfying the public purpose . . . but to forbid public funds from following that public purpose is troubling. . . . [E]xtension of this reasoning, [however], would make the church and the government working partners in the total education function of the Church. . . . Without returning to the "no-aid" absolutism . . . , one can consistently say that the first amendment means at least "no partnership."

Id. (emphasis added).

rian education. The Court's decision to invalidate the program was correct, but the majority opinion failed to elucidate the proper basis upon which to rest the holding.

The Court should also apply the "excessive entanglements" prong of the *Lemon* test in accordance with the "objective observer" test. The Court in *Felton* relied upon this prong in striking down the title I program.²⁰⁹ As stated earlier, this program was closely monitored by the City of New York. Assuming that such steps on the part of the government would prevent the objective observer from perceiving any message of endorsement, there remains the problem of the monitoring itself. To what extent may the state be permitted to interfere in the functioning of the parochial school?²¹⁰

Justice O'Connor, in her *Felton* dissent, suggests that "excessive entanglements" should no longer serve as a separate prong, but should only be applied as part of the "endorsement or disapproval" test.²¹¹ That should not change the result, however, if the analysis suggested above is utilized.²¹² Examining the title I program absent the monitoring system, one finds the same constitutional defects as contained in the Shared Time program in *Ball*.²¹³ Assume, however, that the City's monitoring system sufficiently alters the *context* in which the objective observer views the program. This might protect against a perception of endorsement. Unfortunately, the increased degree of *coinvolvement* between the institutions of the state and the parochial school now gives rise to another evil. The state, if it is not advancing a core function of the sectarian education, is instead now intruding impermissibly into this same core function.²¹⁴ It is

209. *Aguilar v. Felton*, 105 S. Ct. 3232, 3237 (1985).

210. *Cf. Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) ("[I emphasize] the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.").

211. *Felton*, 105 S. Ct. at 3247 (O'Connor, J., dissenting).

212. See *supra* text accompanying notes 198-208.

213. *Felton*, 105 S. Ct. at 3236.

214.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that de-

of course true that this results in a "Catch-22,"²¹⁵ but it is not one of the Court's creation.

The conclusion in the area of government aid to parochial schools is clear. There can be no benefits accruing to these schools that directly advance the core function of the sectarian enterprise. More succinctly, government must stay out of the parochial school classroom.²¹⁶ Other forms of aid, that an objective observer would not consider an advancement of the core function,²¹⁷ may well be permissible.²¹⁸

nomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

Id. at 3237.

215. *Id.* at 3243 (Rehnquist, J., dissenting).

216. This analysis cuts both ways. *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986). This author does not believe that the establishment clause could permit the type of intrusion into the sectarian school classroom contemplated by the state in this case. Just as the state may not send its own personnel in to promote a "core function" of the sectarian institution, neither may it dictate to the school the individuals who shall perform those functions. *Cf. also Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987) (discussed *supra* note 89).

217. Attempting to define with particularity that which constitutes a "core function" of a sectarian school, or of a religious organization in general, presents no fewer problems than an attempt to define "religion" itself. *See supra* note 66. Such a discussion is beyond the scope of this Article. *See generally* Lupu, *supra* note 205, at 400-16 (criticizing such efforts). *Cf. Amos*, 107 S. Ct. at 2870 (Brennan, J., concurring); *Id.* at 2873 (O'Connor, J., concurring) (Justices Brennan and O'Connor each acknowledging the hazards of seeking to determine the areas within a religious organization into which the government may not intrude).

218. A state statute that permitted the distribution of state heating oil to all schools, including sectarian and nonsectarian private schools, would probably be found permissible under the above analysis. So might a statute that permitted state workers and state materials to be used in making repairs to sectarian and nonsectarian private schools, especially where failure to do so might pose a health hazard for the attending children. *See Freund, supra* note 208. This same analysis also suggests why the *Felton* program, if offered to parochial school students in the public schools, would probably survive constitutional scrutiny. *Cf. Wolman*, 433 U.S. at 244-48 (therapeutic psychological services in public and nonpublic schools).

Consider also the constitutionality of the Equal Access Act of 1984, 20 U.S.C. §§ 4071-4074 (Supp. III 1985). The Act, in essence, seeks to guarantee that no extracurricular public high school student group shall be denied an opportunity to meet on school premises during "noninstructional time, . . . on the basis of the religious, philosophical, or other content of the speech at such meetings." *Id.* at § 4071(a), (b). The Act effectively extends the application of the Court's ruling in *Widmar v. Vincent*, 454 U.S. 263 (1981), to include public high school students. The Court itself declined to address the propriety of such an extension in *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326 (1986).

VII. Conclusion

The free choice of each individual in our society in matters of religious belief must remain inviolate. Religion must be completely irrelevant to the manner in which the government causes the individual to interact with the general community. The substantive principle of religious liberty that underlies the religion clauses of the first amendment provides this guarantee. The establishment clause elements of this principle are infringed by government behavior that, through sponsorship or endorsement of religion, through disapproval of or intrusion into the proper sphere of religion, or through the creation of sectarian factionalism, affects the free choice of individuals in matters of religious belief. Continued adoption and further expansion by the Court of Justice O'Connor's "endorsement or disapproval" test, as perceived by "an objective observer," will permit the Court to identify and separate permissible forms of church-state interaction

The constitutional difficulties cannot be easily resolved by resort to free speech principles, as the dissenters in *Bender* argued. While it is certainly true, as Chief Justice Burger noted, "that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character," *id.* at 4311 (Burger, C.J., dissenting) (emphasis in original), it remains equally true, as pointed out earlier, *see supra* note 96, that establishment and free speech concerns will at times cut in opposite directions, and there is no justification for a rule that would mandate the automatic trumping of the establishment concerns in such cases. *Cf. Widmar*, 454 U.S. at 271 ("equal access" policy not incompatible with establishment clause).

The question of constitutionality is a close one. A reasonable person, or "an objective observer, acquainted with the text, legislative history, and implementation of the statute," *Wallace v. Jaffree*, 105 S. Ct. 2479, 2501 (1985) (O'Connor, J., concurring), would, given the *context* of religious activity occurring in public high schools, probably perceive the type of danger that the Jeffersonian element of religious liberty seeks to avoid. By the same token, however, the failure to extend to student religious meetings an existing benefit that is extended to all other student groups could easily be perceived as the type of negative imprimatur that the Williams element attempts to proscribe.

Ultimately, the Act is saved by what appear to be sufficient prophylactic safeguards which will prevent any degree of coinvolvement between the private, individual students and public school officials, *see Lupu, supra* note 205, at 759-61, and most importantly, by the scope of the Act itself, which, like Title VII, *see supra* note 131, extends far past religion and religious speech. The expansiveness of the Act will prevent an objective observer from perceiving the type of close identification between government and any particular religious beliefs (or with religious beliefs in general) that can in turn lead to the type of sectarian factionalism that the Madisonian element seeks to prevent. If it were not for the facial expansiveness of the Act, which classifies religious expression as a protected form of speech, rather than affording a special protection to religion not mandated by the free exercise clause, the above analysis would have led to a conclusion of unconstitutionality.

from those that abrogate the principle of religious liberty. The Court must avoid doctrinaire extremes and reliance upon governing principles, such as "separation," absent a clear understanding of the ends that the governing principles are intended to effect. The principle of religious liberty requires the drawing of a fine line, not the building of a brick wall, or no wall at all.