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Parochial School Aid Revisited: The Lemon Test, The Endorsement Test And Religious Liberty

ERIC J. SEGALL*

“Our decisions in this troubling area draw lines that often must seem arbitrary.”

Former Supreme Court Justice Lewis F. Powell, Jr., characterizing the Court’s parochial school aid cases.

The first amendment to the United States Constitution provides in part that “Congress shall make no law respecting an establishment of religion.”\(^2\) Perhaps no other constitutional provision has engendered as much confusion and controversy as the establishment clause.\(^3\) Despite an abundance of commentary on the subject,\(^4\) and

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2. U.S. Const. amend. I. This language is commonly referred to as the establishment clause.
3. Supreme Court Justice Byron H. White has observed that “Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country.” Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980). Additionally, former Supreme Court Justice Lewis F. Powell, Jr. has stated that establish-
over seventy Supreme Court decisions in the past fifty years, the Court has failed to articulate a satisfactory analysis to apply to establishment clause issues.

One of the most difficult and controversial of all establishment clause questions concerns governmental efforts to assist children attending parochial schools. For example, the Eighth Circuit Court of Appeals, struggling with Supreme Court precedent, recently held that a public school teacher may constitutionally provide secular instruction to religious school students in mobile classrooms parked adjacent to religious school buildings. However, the Supreme Court has held it unconstitutional for public school teachers to provide the same education to religious school students inside religious school buildings. Moreover, although a state may lend secular, state-approved textbooks to children attending religious schools, it may not lend the same students maps, erasers, charts or any other kind of educational materials, even if those materials are used only for secular purposes. In other words, a school district may lend a geography book containing a map of the United States to religious school students but may not lend the map itself.

These kinds of arbitrary distinctions prompted one eminent scholar to conclude that the parochial school aid cases decided by the Supreme Court amount to a “hodge-podge” of decisions derived from “Alice’s Adventures in Wonderland.” This Article explains
how the Supreme Court has reached the point where it is drawing such arbitrary lines and suggests a new analysis which would not only lead to more consistent results in parochial school aid cases, but would also safeguard the important interests that the establishment clause should protect.  

Part I of this Article provides a detailed analysis of the Supreme Court's parochial school aid decisions and divides the Court's jurisprudence into three general time periods. In the first period, from 1971-1977, the Supreme Court invalidated virtually every new governmental effort to assist elementary and secondary parochial schools. During the second period, from 1977-1985, the Court appeared to change direction and approved many forms of aid to these schools. However, in 1985, the beginning of the third period, the Court decided two cases which limited the type of assistance that could be provided to religious schools. In doing so, the Court created much uncertainty as to how the Court would decide such cases in the future.

The summary contained in Part I demonstrates that much of the confusion and inconsistency in the Court's decisions can be traced to the Court's adoption in Lemon v. Kurtzman of the three part test to evaluate governmental efforts to assist parochial schools. Part II

13. Although there has been an abundance of commentary on the subject of the establishment clause, see, e.g., infra note 18, a recent decision by a United States Court of Appeals presented new and difficult issues pertaining to governmental programs providing support to children attending parochial schools. See Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1990); see also Barnes v. Cavazos, No. 90-5470, appeal filed, (6th Cir. March 29, 1990). One important issue presented by both of these cases is whether it is constitutional for publicly funded teachers to provide secular instruction to children attending religious schools in mobile classrooms parked adjacent to or on private school property. See supra note 7 and accompanying text. The Supreme Court has held that it is unconstitutional for publicly funded teachers to provide such instruction in the buildings of the private schools. Aguilar v. Felton, 473 U.S. 402 (1985); School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985). See also infra notes 95-112 and accompanying text. After these decisions, school districts across the country began providing publicly funded instruction to children attending religious schools in mobile classrooms outside the school buildings; a practice that generated the lawsuits in Pulido and Barnes. The strong likelihood that the Court will eventually address the constitutionality of the mobile classroom programs warrants consideration of the proposals set forth in this Article.

14. See infra notes 25-112 and accompanying text. For the purposes of this Article, the term "parochial school," refers to elementary and secondary religious schools, not religiously affiliated colleges and universities. See infra note 37.

15. See infra notes 25-39 and accompanying text.

16. See infra notes 60-94 and accompanying text.

17. See infra notes 95-112 and accompanying text.


19. The Lemon Court held that for a statute to be valid under the establishment
of this Article summarizes Justice O'Connor's proposed alternative to the Lemon test, the "endorsement test," which she has articulated in non-parochial school aid establishment clause cases.\textsuperscript{20} Part III suggests that the underlying principles of the endorsement analysis, that the core concern of the establishment clause is religious liberty, and that religious liberty is infringed when the government links political standing to religious belief, are superior to the principles underlying the Lemon test.\textsuperscript{21} Part III also argues that religious liberty, not endorsement, needs to be the benchmark of establishment clause analysis.\textsuperscript{22} Part IV expands on that principle, and Part V applies that analysis to governmental efforts to assist parochial schools.\textsuperscript{23} The conclusion reached by this application is that religiously neutral parochial school aid programs do not infringe religious liberty and therefore do not violate the establishment clause.\textsuperscript{24}

\textsuperscript{20} See infra notes 25-36 and accompanying text. The Lemon test has been criticized by individual members of the Court. See, e.g., Wallace v. Jaffree, 472 U.S. at 110 (Rehnquist, J., dissenting) ("[t]he three-part Lemon test has simply not provided adequate standards for deciding Establishment Clause cases."); and Wolman, 433 U.S. at 265 (Stevens, J., concurring in part and dissenting in part) (suggesting that the Lemon test be abolished and that a "no aid" test be established). The Lemon test has also been criticized by numerous commentators. See, e.g., Evans, Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis, 64 St. John's L. Rev. 41 (1989); Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311 (1986); Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 (1980). See also Esbeck, The Lemon Test: Should it be Retained, Reformulated or Rejected?, 4 Notre Dame J. L., Ethics & Pub. Pol'y 513, 543 (1990) ("[i]t is hard to think of contemporary legal doctrine that is as besieged from all quarters as is the Lemon test"). Nevertheless, the Court has continued to apply the Lemon test, albeit in a slightly altered form, in recent establishment clause cases. See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988); Edwards v. Aguillard, 482 U.S. 578 (1987); Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986). See Lively, The Establishment Clause: Lost Soul of the First Amendment, 50 Ohio St. L.J. 681, 689 (1989) (despite the "patent inadequacies" of the Lemon test, the Court has "rarely" deviated from it). At least one commentator has recently suggested that the Court should continue to apply the Lemon test. Esbeck, supra note 18, at 548.


21. See infra notes 137-83 and accompanying text.

22. See infra notes 181-83 and accompanying text.

23. See infra notes 185-236 and accompanying text.

24. See infra notes 186-236 and accompanying text.
I. Confusion and Inconsistency-The Supreme Court's Parochial School Aid Decisions

A. The First Period: 1971-1977

The landmark of parochial school aid case is Lemon v. Kurtzman, decided by the Supreme Court in 1971. The Lemon Court examined the constitutionality of a Rhode Island statute that supplemented the salaries of parochial school teachers who taught secular subjects. In addition, the Lemon Court also examined the constitutionality of a similar Pennsylvania statute which reimbursed private schools for some of the costs (such as teachers' salaries, textbooks and other instructional materials) of providing secular instruction. The Lemon Court held that for a statute to be valid under the establishment clause, it must:

1) have a secular legislative purpose;
2) Its primary effect must neither hinder nor advance religion; and
3) The statute must not foster excessive government entanglement with religion.

In applying the three part test to the facts of Lemon, the Court first found that both the Pennsylvania and Rhode Island programs had a secular legislative purpose—improving the quality of secular education in the state. However, the Court did not apply the pri-
mary effect requirement of its test to the facts of *Lemon*. Instead, the Court based its holding on the failure of both programs to meet the third prong of the test because they fostered excessive government entanglement with religion.\(^{30}\)

The Court stated that the proverbial “wall” separating church and state is not actually a “wall,” but just a “blurred, indistinct, and variable barrier.”\(^{31}\) The Court held that the Rhode Island and Pennsylvania programs unlawfully crossed this “barrier.”\(^{32}\) The primary reason cited by the Court for this conclusion was that, although both statutes prohibited reimbursement for religious classes, a prerequisite under the establishment clause, parochial school teachers would nonetheless have difficulty keeping religious influences out of their secular courses because those teachers taught in the pervasively sectarian atmosphere of the private schools.\(^{33}\) Although the Court conceded that the record was devoid of any evidence that such religious influence had actually taken place, the Court held that the monitoring of those classes by public officials to insure the absence of religious influence resulted in excessive entanglement between church and state. Accordingly, the Court invalidated both programs under the third prong of the *Lemon* test.\(^{34}\)

In dissent, Justice White argued that the reasoning of *Lemon* created an “insoluble paradox.”\(^{35}\) He noted that the Court held that states could not finance secular instruction in parochial schools if there was a possibility that religious influence would pervade that instruction, but if the state adopted procedures to insure that there was no such religious influence, those procedures would foster impermissible excessive entanglement with religion.\(^{36}\) The *Lemon* majority was perhaps aware of this weakness in its reasoning as it conceded that it could “only dimly perceive the lines of demarcation of this

\(^{30}\) *Id.* at 613-14.

\(^{31}\) *Id.* at 614-25.

\(^{32}\) *Id.*

\(^{33}\) *Id.* at 617-19.

\(^{34}\) *Id.* at 618-20. The Court also found that the programs caused excessive entanglement for two other reasons. First, it held that the auditing procedures in the Rhode Island program were “fraught with the sort of entanglement that the Constitution forbids” because the public school officials had to “examine the [private] school’s records in order to determine how much of the total expenditures [were] attributable to secular education and how much to religious activity.” *Id.* at 620. Second, the Court held that the programs would lead to “political divisiveness” because voters in the states would be divided on whether to support these kinds of programs. *Id.* at 622-24. *See infra* notes 120 and 195, for a further discussion of the “political divisiveness” analysis.

\(^{35}\) 403 U.S. at 668 (White, J., dissenting).

\(^{36}\) *Id.*
extraordinarily sensitive area of constitutional law."

In the wake of Lemon, states began to draft statutes to provide assistance to parochial schools that did not contain procedures to insure that the programs were entirely secular so that the programs would not run afoul of the excessive entanglement prong of the Lemon test. For instance, in Committee for Public Education & Religious Liberty v. Nyquist, the Court examined a New York statute providing various types of assistance to parochial schools. The statute authorized direct grants to private schools for maintenance and repair of buildings to protect the safety of the children attending those schools, and it provided partial tuition reimbursements and tax credits to parents of children attending private schools. The Court held that all of these programs unlawfully advanced religion under the second prong of the Lemon test because there were no procedures in place to insure that the monies provided to the schools and to the parents would not be used for religious purposes. Of course, had there been such procedures, they would probably have run afoul of the excessive entanglement prong of the Lemon test.

37. 403 U.S. at 612. On the same day as Lemon, the Court decided Tilton v. Richardson, 403 U.S. 672 (1971), in which the Court approved federal monetary aid to colleges and universities, including religious institutions, for construction of academic facilities. The Court approved this aid, with the exception of that part of the statute which stated that the law's prohibition on the use of facilities for religious purpose would expire after twenty years, on the grounds that the maturity of college students and the lack of religious permeation in the schools posed little risk that the aid would advance religion or foster excessive entanglement between church and state. Id. at 685-87. See also Hurt, supra note 12, at 14. Subsequent to Tilton, the Court consistently applied a more deferential standard to governmental programs assisting colleges and universities than to programs assisting elementary and secondary schools. See, e.g., Roemer v. Bd. of Public Works, 425 U.S. 736 (1976) (approving grants to private colleges, some of which were religiously affiliated); Hunt v. McNair, 413 U.S. 734 (1973) (approving issuance of a revenue bond for a Baptist college).


39. Id. at 763-64. A similar safety rationale was used by the Court to uphold the bus transportation program in Everson, 330 U.S. at 1. See supra note 26.

40. 413 U.S. at 764-69.

41. Id. at 794.

42. See Hurt, supra note 12, at 14 n.103. On the same day as Nyquist, the Court decided Sloan v. Lemon, 413 U.S. 825 (1973), in which the Court invalidated a Pennsylvania tuition reimbursement program for parents of private school children that the Court found constitutionally indistinguishable from the New York programs struck down in Nyquist. 413 U.S. at 828. Also in 1973, the Court decided Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973), in which the Court examined a New York statute which reimbursed private schools for the costs of complying with state mandated testing requirements. Most of these costs were associated with preparing and grading state required examinations which had to be secular. Id. at 474-78. Nevertheless, the Court held that the statute was unconstitutional under the primary effect prong of the Lemon test because there was no monitoring procedure in place to make sure that the
By the end of 1973, the Court had invalidated salary supplements for private school teachers, tax benefits and tuition reimbursements for parents of children attending religious schools of payments to private schools for the repair of buildings, and the expense of complying with state testing requirements. Although the Court was hostile to governmental efforts to assist parochial schools, the results reached by the Court from its application of the Lemon test were arguably consistent. This consistency ended in 1975, however, when the Supreme Court issued its decision in Meek v. Pittenger.

In Meek, the Court examined a Pennsylvania statute that loaned, not only secular textbooks to private school children as had been approved in Board of Education v. Allen, but also instructional equipment and materials such as film projectors, maps, globes and laboratory equipment. The statute also authorized the state to provide secular “auxiliary services” to children in private schools on the premises of the private schools. These auxiliary services included guidance counseling, remedial instruction, and speech and hearing services.

The Court began by noting that the textbook portion of the statute was indistinguishable from the textbook program upheld in Board of Education v. Allen, and therefore was constitutional. However, the Court went on to hold that the loan of secular educational equipment and materials other than textbooks violated the primary effect prong of the Lemon test. The Court held that such aid, although earmarked for non-religious purposes, advanced the religious mission of the schools because the religious mission and the secular educational mission could not be separated in elementary and secondary parochial schools. The Court distinguished the loan of equipment and materials from the loan of textbooks upheld in Board of Education v. Allen on the grounds that the equipment and materials were loaned directly to the private schools, whereas the books were loaned to the students.

tests were actually secular. Id. at 479-82.
43. See supra notes 25-33 and accompanying text.
44. See supra notes 38-41 and accompanying text.
45. Id.
46. See supra note 42.
47. 421 U.S. 350 (1975).
49. 421 U.S. at 355.
50. Id. at 351-53.
51. Id.
52. Id. at 359-62.
53. Id. at 365-66.
54. Id. at 362-63 (stating that “[a]lthough textbooks are lent only to students, [the statute at issue] authorizes the loan of instructional material and equipment directly to qualifying” private schools).
In dissent, Justice Rehnquist noted that, in Allen, the textbooks were stored at the private schools and used by the students in a manner indistinguishable from the equipment and materials at issue in Meek. He argued that there was no real distinction between the lending of educational materials to the schools and the lending of such materials to the students and therefore, the majority's reasoning was faulty.

The Meek Court also invalidated that portion of the statute authorizing "auxiliary services" in the private schools. The Court held that these services, like the salary supplements in Lemon, violated the third prong of the Lemon test because the monitoring necessary to insure that the teachers providing the auxiliary services did not teach religion would foster excessive entanglement between church and state.

The Meek decision evidenced the Court's reluctance to approve most forms of assistance to parochial schools as well as the difficulty the Court was having applying the Lemon test. These problems intensified during the 1977-1985 period even though the Court began to be more lenient towards state programs designed to assist children attending parochial schools.


In Wolman v. Walter, the Court examined an Ohio statute that: 1) loaned private school pupils textbooks, instructional materials and equipment; 2) authorized the state to provide standardized testing and diagnostic services for students attending private schools; 3) authorized therapeutic and remedial services for these students off the premises of the private schools; and 4) provided funds for field trip transportation. The Court once again affirmed the lending of textbooks relying on Allen and Meek, and specifically rejected the plaintiffs' request that the Court overrule those decisions.

55. Id. at 390-91 (Rehnquist, J., dissenting).
56. Id. at 391 (Rehnquist, J., dissenting).
57. Id. at 367-73.
58. See supra notes 25-33 and accompanying text.
59. 421 U.S. at 369-70. The Court did not question the good faith of the public school personnel providing the services, but held that the "prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." Id. at 369-70 (quoting Lemon, 403 U.S. at 619).
61. Id. at 233.
62. Id. at 236-38.
The Court also approved the providing of state testing and scoring services for children attending private schools. The Court upheld this aid saying that, because the state prepared and graded the tests, there was no danger of any religious content in the tests.63 The Court distinguished Levitt v. Committee for Public Education & Religious Liberty,64 on the grounds that in Levitt, unlike Wolman, the public school authorities had no control over the tests and therefore could not insure that they were completely secular.65

The Wolman Court also approved the use of public school personnel to provide diagnostic testing to private school children in private school buildings. The Court held that, unlike teaching and counseling, diagnostic testing does not involve the transmission of substantive views. Accordingly, there was no danger of a religious message being conveyed by the public school employee.66 The Court also held that providing secular services such as therapeutic and remedial services to private school children in neutral locations off the premises of the private schools did not advance religion or foster excessive entanglement because the services were provided outside the pervasively sectarian atmosphere of the private schools.67

The Wolman Court then turned to the lending of equipment and materials.68 Ohio attempted to distinguish the equipment and materials program invalidated in Meek on the grounds that the statute in Meek loaned the equipment and materials directly to the schools, whereas the Ohio program loaned the equipment and materials directly to the students or parents.69 The Wolman Court rejected this distinction stating that, prior to Meek, Ohio loaned the materials directly to the schools and the use of those materials did not change after the statute was amended.70 Therefore, as it did in Meek, the Court invalidated the lending of equipment and materials on the grounds that such aid had the primary effect of advancing religion under the second prong of the Lemon test.71

63. Id. at 240.
64. See 413 U.S. 472 (1973) (supra note 42).
65. 433 U.S. at 240.
66. Id. at 241-43 (stating that “[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student”).
67. Id. at 244-48.
68. The equipment and materials included such items as record players, maps, globes, and science kits. Id. at 249.
69. Id. at 250. (“Appellees seek to avoid Meek by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent.”). Id.
70. Id.
71. Id. at 251 n.18. The Court recognized, however, that this decision was inconsistent with its holding that textbooks could be loaned and stated that there was “tension between this result and the holding in [Allen].” Id. Instead of trying to reconcile this
Finally, the *Wolman* Court invalidated the public funding of field trips for private school students under both the second and third prongs of the *Lemon* test. The Court held that field trips had an educational component that the bus transportation program upheld in *Everson v. Board of Education* did not, and therefore, the funding of the field trips had the primary effect of unlawfully advancing religion. The Court also noted that the private school teacher made the field trip a valuable experience. Therefore, the state's monitoring of that teacher to insure that no religious message was communicated would foster excessive entanglement between church and state.

In his concurring opinion in *Wolman*, Justice Powell stated that “[o]ur decisions in this troubling area draw lines that often must seem arbitrary.” To illustrate Justice Powell's point, the *Wolman* Court held that textbooks could be lent to private school children but not maps or charts. Furthermore, the Court held that providing equipment and materials to children attending religious schools constituted an unlawful subsidy to those schools, but providing remedial classroom instruction to private school children did not have the same effect provided the instruction took place off the school grounds. The Court drew this distinction even though providing classroom instruction subsidized the private schools to an equal or greater extent than the loaning of maps and globes.

*Wolman* was significant because it demonstrated that the Court would continue to apply the *Lemon* test to parochial school aid cases even if the application of that test led to inconsistent results. The *Wolman* decision also demonstrated that the Court was becoming somewhat less hostile to governmental efforts to assist parochial
schools because it marked the first time since Lemon that the Court approved aid, other than textbooks, to such schools. Although the Court would continue to apply Lemon, its application of that test was about to change dramatically.

In the early 1980s, the Supreme Court decided two significant parochial school aid cases. In Committee for Public Education & Religious Liberty v. Regan, the Court examined a New York statute that provided direct cash reimbursements to private schools for compliance with state testing requirements where the tests were prepared by the state but administered and graded by the private schools. New York enacted this statute after the Supreme Court had invalidated its previous testing reimbursement statute because that statute did not limit reimbursement to state prepared exams. Justice White, writing for the Court, applied the Lemon test and upheld these direct cash grants. He stated that Wolman v. Walter was controlling because, if the state could administer and grade state prepared exams for private school students, then the state could reimburse the private schools for performing the identical tasks. The decision in Regan is significant because it marked the only time that the Supreme Court has approved direct cash educational subsidies to parochial schools.

Justice Stevens dissented in Regan and noted that the private schools had an obligation under state law to administer the tests that were at issue. Accordingly, by reimbursing the private schools for the cost of those tests, the state was providing an unconstitutional subsidy to those schools. He characterized the Court's previous parochial school aid decisions as "a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools." He concluded that trying to patch together the "blurred, indistinct and variable barrier" of separation between church and state described in Lemon was a hopeless task and that the Court should instead simply invalidate all governmental aid to parochial schools.

Three years after Regan, and twelve years after Lemon, the Su-

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80. 444 U.S. 646 (1980).
81. Id. at 651-52.
82. Id at 648-52. See also supra note 42.
83. 433 U.S. at 229 (1977). See also supra notes 60-75 and accompanying text.
84. See supra notes 63-65 and accompanying text.
85. 444 U.S. at 657 ("As in Wolman v. Walter, . . . the nonpublic school does not control the content of the test or its result; and here, as in Wolman, this factor serves to prevent the use of the test as a part of religious teaching . . . thus avoiding the kind of direct aid forbidden by the Court's prior cases"). Id. at 656 (quoting Wolman, 433 U.S. at 240).
86. Id. at 671 (Stevens, J., dissenting).
87. Id.
88. Id.
The Supreme Court decided a case which, contrary to Justice Stevens' hopes, upheld another form of aid to parochial school students. In *Mueller v. Allen*, the Court upheld a Minnesota statute which provided an income tax deduction for tuition and other educational expenses for parents of students who attended religious schools. The Court held that the statute did not unlawfully advance religion because it provided benefits directly to the parents rather than the schools, and because the deductions were theoretically available to parents of children attending both religious and non-religious schools, although most of the benefits went to parents of children in private religious schools. The Court distinguished *Committee for Public Education and Religious Liberty v. Nyquist*, where the Court had invalidated similar tax benefits to parents of children attending private schools, on the grounds that the statute in *Nyquist* applied exclusively to parents of private school children, whereas the statute in *Mueller*, at least on its face, applied to parents of both public and private school children.

The highly questionable lesson of *Mueller* was that states wanting to assist parochial schools should draft statutes that facially benefited all schools, even if in practice the program mostly assisted religious schools. Moreover, the Court's reliance in *Mueller* on the facial neutrality of the statute to answer the question whether the primary effect of the statute advanced religion was questionable at best.

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90. *Id.* at 398-99. See also infra note 92.
91. See *supra* notes 38-42 and accompanying text.
92. 463 U.S. at 398. The Court in *Mueller* also drew a distinction between the "tax credit" plan in *Nyquist* and a genuine "tax deduction." 463 U.S. at 396-97 n.6. This distinction, however, is not persuasive because the statutes in both *Mueller* and *Nyquist* had "largely equivalent effects" on "religious exercise—the matter really at issue." See Paulsen, *supra* note 18, at 357.

Moreover, as the dissent in *Mueller* pointed out, most of the benefits provided by the statute went to parents of children attending private schools because parents of children attending public schools generally did not pay tuition or have other educational expenses. *Id.* at 405 (Marshall, J., dissenting). In 1978-79, for example, only 79 out of 815,000 students who attended public schools were eligible for the tuition deduction whereas over 90,000 private school students qualified for the deduction, 95% of whom attended religious schools. *Id.* The majority in *Mueller* stated, however, that it was not going to examine the year-to-year impact of the statute because "such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." *Id.* at 401.

93. See Note, *Facially Neutral Tax Deductions for Educational Expenses and the Establishment Clause*, 10 WM. MITCHELL L. REV. 297, 315 (1984) ("[t]he majority's refusal to look beyond the facial neutrality of the statute is the most questionable aspect of the Mueller decision").
After Mueller and Reagan, it appeared that the Court had changed direction and would be far more tolerant of governmental aid to parochial schools. However, two years after Mueller, the Court decided two cases which demonstrated that the Court had changed direction once again.

C. The Third Period: 1985-The Present

On July 1, 1985, the Supreme Court decided its two most recent cases involving governmental efforts to assist the education of children attending parochial schools. In School District of the City of Grand Rapids v. Ball, the Court invalidated two state programs conducted in rented private school classrooms, one taught by public school teachers during the regular school day, and one taught after regular school hours by private school teachers. Although both programs were limited to secular courses that were "supplemental" to the curriculum already offered by the private schools, there was no monitoring of the programs to guard against the teaching of religion during the secular classes.

The Court invalidated both programs under the second prong of the Lemon test. The Court set forth three reasons why the programs unlawfully advanced religion. First, although the Court did not dispute the good faith of the teachers, the Court stated, as it had in the past, that even the best intentioned teachers may become inadvertently involved in inculcating religious beliefs when they teach in the pervasively sectarian atmosphere of the parochial schools. Second, the Court stated that the programs provided a symbolic benefit to religion by linking government and religion in the eyes of impressionable students and the public. Third, the Court said that the programs advanced religion because, by subsidizing the secular education of the private schools, the Court was also subsi-

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94. See Note, supra note 93, at 300 ("[t]he Mueller decision marks a significant shift in constitutional doctrine regarding aid to parochial schools and the establishment clause").
96. Id. at 376-77.
97. Id. at 375-76, 396.
98. Id. at 387.
99. Id. at 397-98. The Court stated that, because the programs violated the primary effect prong of the Lemon test, it "need not determine whether aspects of the challenged programs impermissibly entangle the government in religious matters, in violation of the third prong of the Lemon test." Id. at 397 n.14.
100. See Lemon, 403 U.S. at 618-19.
101. 473 U.S. at 387 (stating that "[t]he danger arises 'not because the public employee is likely [to] deliberately subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.'". Id. (quoting Wolman, 433 U.S. at 247).
102. 473 U.S. at 389-92. This was the first time the Court employed this symbolic union analysis in a parochial school aid case. See Marshall, supra note 10, at 520.
dizing the religious mission of the schools because those missions could not be separated.108

On the same day that Grand Rapids was decided, the Court examined, in Aguilar v. Felton,104 a federal program similar to the state programs invalidated in Grand Rapids.105 This federal program also authorized public school teachers to provide secular education to children attending religious schools in the classrooms of the religious schools.106 However, unlike the programs in Grand Rapids, the federal program in Felton had a monitoring system in place to prevent the teachers from providing a religious message during the secular instruction.107 Nevertheless, the Court held that it was unconstitutional for public school employees to teach in the classrooms of the private schools because the monitoring of those teachers resulted in excessive entanglement between church and state.108

The Court's decisions in Grand Rapids and Felton bring into sharp focus the analytical problems with the Lemon test and the "Catch-22" of the excessive entanglement and primary effect portions of the test.109 The state programs in Grand Rapids were invalidated because there was no monitoring system in place to insure that

103. Id. at 392-97. Justice O'Connor concurred in part in Grand Rapids, joining that part of the decision invalidating the state program that paid private school teachers to instruct children attending that school after regular school hours. Id. at 399-400 (O'Connor, J., concurring in part and dissenting in part). She stated that "[w]hen full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, . . . the program has the perceived and actual effect of advancing the religious aims of the church-related schools."). Id. For a further discussion of Justice O'Connor's views, see infra notes 113-36 and accompanying text.


105. Id. at 409 (stating that "[t]he New York programs challenged in this case are very similar to the programs we examined in Ball").

106. Id. at 404-07.

107. Id. at 406-07.

108. The Court stated that "the pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. . . . [T]he religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." Id. at 413. The Court also held that the "administrative cooperation" required to maintain the educational program fostered excessive entanglement because it resulted in "frequent contacts" between the private and public school teachers. Id.

Ironically, former Chief Justice Burger, who had written the majority opinion in Lemon, and was the author of the three part test, dissented bitterly in Felton, saying that the decision "border[ed] on paranoia," and had no support in "logic, experience, or history." Id. at 419 and 420.

the teachers did not inculcate religious values, whereas the federal program in *Felton* was invalidated because this type of monitoring system was created to guard against the transmission of such values.\textsuperscript{110} In addition, both programs were held unconstitutional even though the records in the cases did not exhibit a single instance of unlawful religious indoctrination in the private schools.\textsuperscript{111} The "insoluble paradox" created by the *Lemon* test,\textsuperscript{112} was never more apparent than after *Grand Rapids* and *Felton*. The next section of this Article summarizes Justice O'Connor's alternative to this "insoluble paradox," the endorsement test.

II. JUSTICE O'CONNOR'S ENDOREMENT ANALYSIS AS AN ALTERNATIVE TO THE LEMON TEST

Justice O'Connor first articulated her endorsement analysis in *Lynch v. Donnelly*,\textsuperscript{113} where the Court upheld a publicly funded nativity scene that was part of a Christmas display in a park owned by a private corporation.\textsuperscript{114} Applying the *Lemon* test, the Court found that the nativity scene was a "passive symbol,"\textsuperscript{115} the purpose of which was to celebrate the holiday season, not to celebrate Christianity. Therefore, the funding of the scene did not violate the establishment clause.\textsuperscript{116}

Justice O'Connor concurred in the judgment but wrote separately to "suggest a clarification of our establishment clause doctrine."\textsuperscript{117} She suggested that the establishment clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."\textsuperscript{118} Justice O'Connor stated that government can "run afoul" of that prohibition by either excessive entanglement with religious institutions or by endorsing or disapproving religion.\textsuperscript{119}

Justice O'Connor applied her endorsement analysis to the nativity

\begin{enumerate}
\item \textsuperscript{111} See 473 U.S. at 388-89; 473 U.S. at 424 (O'Connor, J., dissenting). See also Paulsen, supra note 18, at 360-61.
\item \textsuperscript{112} See supra notes 35-36 and accompanying text.
\item \textsuperscript{113} 465 U.S. 668 (1984).
\item \textsuperscript{114} Id. at 671.
\item \textsuperscript{115} Id. at 686.
\item \textsuperscript{116} Id. at 685-87.
\item \textsuperscript{117} Id. at 687 (O'Connor, J., concurring).
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 687-88 (government entanglement with religious institutions "may interfere with the independence of the institutions," or "give the institutions access to government or governmental powers not fully shared by nonadherents of the religion," and endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").
\end{enumerate}
scene by first agreeing with the district court that there was no excessive institutional entanglement present in the case. She then stated that "[t]he central issue in this case is whether Pawtucket has endorsed Christianity by its display of the [nativity scene]." To answer this question, she reformulated the first two prongs of the Lemon task to ask whether the government's "actual purpose is to endorse or disapprove of religion," and whether the effect of the governmental practice, regardless of its purpose, "conveys a message of endorsement or disapproval."

Justice O'Connor answered the first question in the negative by finding, as did the majority, that the purpose of the nativity scene was to celebrate a public holiday, not to endorse a religious message. To answer the second question, she compared the nativity scene to the printing of "In God We Trust" on coins and with opening sessions of the Court with "God save the United States and this honorable court," and stated that the nativity scene had more historical than religious significance and was understood more as a celebration of a public holiday than religious beliefs. Accordingly, Justice O'Connor believed that the nativity scene did not endorse or disapprove of religion and therefore did not violate the establishment clause.

Justice O'Connor refined her endorsement analysis in Wallace v. Jaffree, where the Court invalidated an Alabama statute authorizing a moment of silence in the public schools on the grounds that the statute lacked a secular legislative purpose under the first prong of the Lemon test. In her concurring opinion, Justice O'Connor stated that the Alabama statute violated the establishment clause because both the intent and the effect of the statute was to endorse religious prayer in the public schools. However, she also concluded that other moment of silence statutes could pass constitutional mus-

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120. Id. at 689. Justice O'Connor also stated that the "political divisiveness" doctrine should not be an independent consideration under the establishment clause. See also supra note 34 and infra note 195.
121. Id. at 690.
122. Id.
123. Id. at 691.
124. Id. at 692-93.
125. Id. at 694.
127. Id. at 56 ("the enactment of [the statute] was not motivated by any secular purpose—indeed, the statute had no secular purpose") (emphasis in original).
128. Id. at 77-79 (O'Connor, J., concurring). Justice O'Connor noted that the State of Alabama had conceded in the district court that the purpose of the statute was to "make prayer part of daily classroom activity." Id. at 77-78.
ter if their intent was to encourage a moment of reflection of any kind, not necessarily religious prayer.\textsuperscript{128}

In \textit{Jaffree}, Justice O'Connor also expanded on how she would apply her endorsement analysis. She stated that the review of legislative intent under the first prong of the test should be deferential and limited.\textsuperscript{129} She stated that under the second prong of the test, the "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 religion.\textsuperscript{130} She summarized her endorsement test as follows:

The endorsement test does not preclude government from acknowledging religion or from taking religion in account into making law or policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of the 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."\textsuperscript{131}

After \textit{Jaffree}, Justice O'Connor continued to advocate her endorsement analysis in establishment clause cases.\textsuperscript{132} Moreover, in \textit{County of Allegheny v. ACLU},\textsuperscript{133} Justice Blackmun, writing for the Court, employed Justice O'Connor's endorsement analysis to invalidate the City of Pittsburgh's nativity scene display but hold constitutional a menorah placed next to a Christmas tree.\textsuperscript{134} Justice Blackmun stated that the endorsement test "provides a sound analytical framework for evaluating governmental use of religious symbols."\textsuperscript{135} However, it is far from clear whether a majority of the Court will apply Justice O'Connor's endorsement test to establishment clause cases not involving religious symbols, such as parochial school aid cases.

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 73-74.
  \item \textsuperscript{130} \textit{Id.} at 74-75.
  \item \textsuperscript{131} \textit{Id.} at 76.
  \item \textsuperscript{132} \textit{Id.} at 70, quoting \textit{Engel v. Vitale}, 370 U.S. 421, 431 (1962).
  \item \textsuperscript{134} 109 S. Ct. 3086 (1989).
  \item \textsuperscript{135} \textit{Id.} at 3115-16.
  \item \textsuperscript{136} \textit{Id.} at 3102. \textit{See infra} note 182. For a discussion of Justice Kennedy's criticism of the endorsement test in his concurring and dissenting opinion in \textit{County of Allegheny}.
\end{itemize}
III. THE FAILINGS OF THE LEMON AND ENDORSEMENT TESTS

A. The Core Concern of the Establishment Clause

Whatever the establishment clause means, it cannot mean that a state can loan a book to a private school student but not a map or chart,\textsuperscript{137} or that publicly funded teachers can provide instruction in mobile classrooms parked six inches away from private school classrooms\textsuperscript{138} but not in private school classrooms.\textsuperscript{139} Nevertheless, the application of the Lemon test has led to these results. Before turning to the specific analytical failings of the Lemon test, it is essential to identify, in a general way, the core value that the establishment clause should protect.\textsuperscript{140} There “is near-universal agreement that the establishment clause . . . has as its ultimate goal the protection of religious liberty.”\textsuperscript{141} Justice O'Connor has stated that “the Court has been and remains unanimous” that the purpose of the establishment clause “is to secure religious liberty.”\textsuperscript{142} The

\textsuperscript{137} See supra notes 52-54 and accompanying text.

\textsuperscript{138} See Pulido, 934 F.2d at 921.

\textsuperscript{139} See Pulido, 934 F.2d at 921.

\textsuperscript{139} Aguilar, 473 U.S. 402; Grand Rapids, 473 U.S. 373.

\textsuperscript{140} For a detailed discussion of the appropriate concerns of the establishment clause, see infra notes 185-236 and accompanying text.

\textsuperscript{141} Esbeck, supra note 18, at 514.

\textsuperscript{142} See also Beschle, supra note 76, at 164 (“the vast changes in society . . . make it un-
problem is not the Court's failure to "agree on the purpose that underlies" the establishment clause but on the Court's inability "to obtain agreement on the standards that govern [its] application." Accordingly, for the purposes of the following discussion, it will be assumed that the core concern of the establishment clause is the protection of religious liberty.

B. The Weaknesses of the Lemon Test

The main failing of the Lemon test is that it fails to identify how religious liberty is impacted by its three prongs. It is not self-evident that a legislative enactment infringes religious liberty simply because its purpose is religious, its primary effect advances religion, or because governmental and religious entities entangle themselves to achieve purely secular goals. The Lemon test obscures what


144. The protection of religious freedom is also the central concern of the free exercise clause which enjoins Congress from "prohibiting the free exercise" of religion. U.S. Const. amend I. See Wallace, 472 U.S. at 68 (O'Connor, J., concurring) (the "common purpose of both religion clauses is to secure religious liberty"); Choper, supra note 18, at 678 ("the "central aim of the Religion Clauses" is the "protection of religious liberty"). Although the Supreme Court has generally applied a free exercise analysis to governmental programs which penalize or prohibit religious beliefs or practices, and not to parochial aid statutes, see infra notes 186-90 and accompanying text, several commentators have recently suggested that the two clauses should be applied in the same manner. See Paulsen, supra note 18, at 350-51; Ward, supra note 142, at 1739-40. The correctness of this proposition, as well as the scope of the free exercise clause, is beyond the scope of this Article, which is concerned only with whether the government is prohibited from assisting parochial schools—an issue that the Supreme Court has analyzed exclusively under the establishment clause.

145. In addition to the well documented problems with attempting to ascertain the subjective motivations that led to the adoption of specific pieces of legislation, see Esbeck, supra note 18, at 516-17, it makes little sense to invalidate a law that when implemented does not infringe religious liberty solely because the intent of the law was religious. See Choper, supra note 18, at 687, and note 195, infra.

146. Justice O'Connor has stated that the "Lemon test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion . . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Lynch, 465 U.S. at 692 (O'Connor, J., concurring). Justice O'Connor is correct that the advancement of religion, in and of itself, does not amount to a constitutional violation because there are many circumstances where religion is advanced, such as when churches are provided tax-exempt status, but where there is no harm to religious liberty. Moreover, it is often extremely difficult to determine whether a statute's primary effect, as opposed to simply its effect, advances religion. As discussed, infra notes 165-84 and accompanying text, the Court should focus on whether religious liberty is infringed, not with whether religion is advanced.

147. The mere fact that governmental and religious officials work together to further secular goals does not by itself implicate religious liberty. Although excessive entanglement between religious and governmental officials might, under certain circumstances, lead to the derogation of religious liberty, the establishment clause violation should be
should be the essential inquiry of establishment clause analysis; does the law at issue infringe religious liberty?\textsuperscript{148}

The inconsistent results in the area of parochial school aid can be traced directly to the Court's failure to identify how the programs it has invalidated infringe religious liberty. For example, in \textit{Aguilar v. Felton},\textsuperscript{149} the Court held that it was unconstitutional for public school teachers to provide secular education to private school children in the classrooms of the private schools because the monitoring of those teachers to insure that classes would be free of religious influence fostered excessive entanglement between church and state.\textsuperscript{150} However, the Court did not overrule \textit{Wolman v. Walter}\textsuperscript{151} in which similar services were held constitutional because they were offered off the premises of the private schools.\textsuperscript{152} It is difficult, if not impossible, to discern why religious liberty is compromised by one educational program but not the other.\textsuperscript{153}

\textsuperscript{148} See Comment, Using the Lemon Test as Camouflage: Avoiding the Establishment Clause, 16 WM. MITCHELL L. REV. 835, 859 (1990) ("[t]he principal problem with the Lemon test . . . is that it allows courts to avoid asking the fundamental questions or applying the underlying principles of the establishment clause in a direct and tangible way. The Lemon test deals with manifestations of the establishment clauses' principles and not with the principles themselves"). This is not to say that the concerns inherent in the Lemon test are not valid concerns, but rather that they are just concerns, and should not constitute independent criteria without reference to the preservation of religious liberty. See Mueller v. Allen, 463 U.S. 388, 394 (the Lemon test should be abolished because it serves no interest protected by the establishment clause).

\textsuperscript{149} 473 U.S. 402 (1985). See also supra notes 104-08 and accompanying text.

\textsuperscript{150} Id. at 414.

\textsuperscript{151} 433 U.S. 229 (1977). See also supra notes 60-75 and accompanying text.

\textsuperscript{152} Id. at 244-48.

\textsuperscript{153} The majority in Felton attempted to justify the result by stating that "[w]hen the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious beliefs of those who are not adherents of that denomination 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." 473 U.S. at 409-10. As to the first concern, the Court never adequately explained how providing \textit{secular} instruction "enmeshed" the state in "matters of religious significance." As to the second concern, the Court expressed the belief that representatives of the private school must "endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." Id. at 413. The private schools were not forced to "endure" anything, however, and, if they felt that...
Similarly, the Court in Wolman did not explain why religious liberty is infringed when a state provides money for secular field trips for private school children, but not when the state pays for the bus transportation of private school children to and from school. The Wolman Court attempted to distinguish Everson on three grounds. First, the Court stated that because the private schools controlled the timing and frequency of the field trips, the schools rather than the children were the true beneficiaries of the aid. However, it is difficult to understand how this distinction impacts religious freedom. In Wolman, the government assisted the budgets of the private schools by paying for their secular field trips, and in Everson the government assisted their budgets by relieving them of the financial burden of insuring that their children were able to be transported safely to and from school. The effect on religious liberty was the same in either case.

Second, the Wolman Court distinguished Everson on the grounds that field trips, unlike bus transportation, are an “integral part of the educational experience,” and an “unacceptable risk of fostering religion is an inevitable byproduct,” of government funding of those trips. Although Everson may be distinguished in this manner, Board of Education v. Allen, in which the Court upheld the providing of secular textbooks, cannot be. It is indisputable that textbooks are as “integral” a part of the “educational experience” as field trips. Furthermore, just like field trips, “it is the individual teacher who makes a [discussion of a textbook] meaningful.” Accordingly, there is no significant distinction between the state paying for secular field trips for private school children and the state paying for secular textbooks for those children.

Third, the Wolman Court distinguished Everson on the grounds that the state's supervision of the private school teachers who led the field trips resulted in excessive entanglement between church and state. However, the Court did not even attempt to explain how such supervision infringes religious liberty. In fact, the zealous su-

the monitoring system employed by the public school authorities infringed their religious liberty, the schools simply could have declined to participate in the program.

154. 433 U.S. at 252-54. See also supra notes 72-75 and accompanying text.
156. 433 U.S. at 253.
157. Id.
158. Presumably, the religious freedom of nonadherents could be infringed if government funds were used to espouse a particular religious belief during the field trips. Of course, the field trips were “designed to enrich the secular studies of students.” 433 U.S. at 252 (emphasis added).
160. Wolman, 433 U.S. at 253.
161. Id. at 254.
162. Id.
supervision of private school teachers to insure that they do not inculcate religious values during field trips arguably increases, not decreases, the religious freedom of nonadherents.¹⁶³

These examples demonstrate how the various prongs of the Lemon test have obscured the goal of religious freedom which is the central concern of the establishment clause.¹⁶⁴ The next section of this Article examines whether Justice O'Connor's endorsement analysis fares any better in its attempt to guard religious freedom.

C. The Failings of the Endorsement Test

Unlike the Lemon test, Justice O'Connor's endorsement test specifically identifies and defines the elements of religious liberty that it is designed to protect. According to Justice O'Connor, the core concern of the establishment clause and religious freedom is that government must not make "adherence to religion relevant to a person's standing in the political community."¹⁶⁵ Pursuant to this command, government must not endorse or disapprove of religion because doing so "sends a message to nonadherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community."¹⁶⁶ Endorsement or disapproval of religion impairs religious freedom because "[w]hen the power, prestige and financial support of the 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."¹⁶⁷

It is equally "plain" that Justice O'Connor's endorsement analysis defines "religious freedom" more directly than the Lemon test. The endorsement test "properly suggests that establishment clause inquiry should focus on the impact of state actions on nonadherents of benefitted creeds, lest the state place a 'badge of inferiority' on these citizens because of their beliefs."¹⁶⁸ Most statutes challenged under

¹⁶³. The religious freedom of the schools is not a proper consideration as the schools could simply decline the money if the conditions on its receipt were too onerous. See also supra note 153 and infra notes 168-69 and accompanying text.
¹⁶⁴. See Note, Developments in the Law-Religion and the State, 100 HARV. L. REV. 1607, 1644 (1987). ("[T]he rigid formulation of the [Lemon] test is out of touch with the establishment clause goal of preserving religious liberty").
¹⁶⁷. Wallace, 472 U.S. at 70 (quoting, Engel v. Vitale, 370 U.S. 421, 431 (1962)).
¹⁶⁸. Note, supra note 164, at 1647, quoting, Loewy, Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of
the establishment clause will inevitably benefit one or more religious sects and Justice O'Connor is quite right to analyze the constitutionality of such statutes by reference to how they impact those who are not benefitted by the statute. One of the grave errors of the Court's current establishment clause jurisprudence is the invalidation of certain forms of aid to parochial schools because the monitoring of that aid allegedly impairs the religious freedom of the recipients of the aid.\textsuperscript{6} This analysis ignores the crucial fact that these recipients, if they believe that such monitoring is too intrusive, can simply decline to receive the aid and therefore avoid the impairment of their religious freedom.

The mere fact that the endorsement test defines religious liberty more directly than the \textit{Lemon} test, however, does not answer the question whether the endorsement test should be applied by the Court in future parochial school aid cases. Although the endorsement test initially received significant approval from commentators,\textsuperscript{170} it has also been the subject of much criticism.\textsuperscript{171} Led by Professor Steven D. Smith,\textsuperscript{172} these objectors believe that the test is unworkable because it is "just a variant on the neutrality ideal,"\textsuperscript{173} which does not supply any meaningful standards which can be used to evaluate governmental practices which impact religious beliefs.\textsuperscript{174} These commentators argue that the endorsement test "leaves unanswered the critical question of what the proper criteria are" to determine establishment cause violations.\textsuperscript{176}

These criticisms do not take issue with Justice O'Connor's belief that the core concern of the establishment clause is that government


\textsuperscript{170} See Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266, 274 (1987) (citing various articles and stating that "[n]umerous academic commentators have written approvingly of the [endorsement] test").

\textsuperscript{171} \textit{Id.} at 331. ("the 'no endorsement' test is riddled with analytical flaws that can only compound the confusion and inconsistency afflicting current establishment doctrine"); Esbeck, \textit{supra} note 18, at 546 ("Justice O'Connor's enthusiasm for her 'no endorsement' approach will hopefully abate and it can be forgotten"); See Hirt, "Symbolic Union" of Church and State and the "Endorsement" of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence, 24 Wake Forest L. Rev. 823, 847 (1989); Ward, \textit{supra} note 142, at 1748- 51; Evans, \textit{supra} note 18, at 95.

\textsuperscript{172} See Smith, \textit{supra} note 170.

\textsuperscript{173} Esbeck, \textit{supra} note 18, at 545 (emphasis in original).

\textsuperscript{174} Smith, \textit{supra} note 170, at 330 ("[t]he problem with the 'no favoritism' version of neutrality is that it is too gross; in its apparent absoluteness it gives no guidance as what kinds of favoring are permissible and what kinds are not"). See also Paulsen, \textit{supra} note 18, at 353 ("[n]eutrality', like 'equality', is a principle of relationship, not content").

\textsuperscript{175} See, \textit{e.g.}, Paulsen, \textit{supra} note 18, at 330. See also Hirt, \textit{supra} note 171, at 847 (the endorsement analysis in Lynch v. Donnelly supplies "no systemic rules" to be applied in future cases).
must not make a person's religious beliefs relevant to his standing in the political community. In fact, Professor Smith explicitly stated that this premise is "appealing" and "in some sense, correct." Instead, Professor Smith suggests that there is little connection between Justice O'Connor's endorsement analysis and the goal of divorcing religion from a person's political standing. He convincingly points out that a law may endorse religion without impacting a person's standing in the political community and vice-versa.

Professor Smith concluded:

[j]f the goal of the establishment clause is to make political standing independent of religion... [t]he Supreme Court should develop doctrine which invalidates laws or practices that affect political or civil rights on religious grounds. There is no apparent reason for the Court instead to adopt a doctrinal test focusing upon an altogether different factor [endorsement] which is at best a less than faithful proxy for the goal the Court seeks to achieve.

These criticisms, that the notion of endorsement is not self-defining, that there are circumstances where government endorsement of religion does not necessarily lead to political harm because of one's religious beliefs, and that there can be infringement of religious liberty in circumstances apart from government endorsement of religion, carry much force. However, these criticisms do not contradict the idea that the core value of the establishment clause is religious liberty and that political standing and religious belief must not be intertwined. Nor do these criticisms take issue with the suggestion that some forms of government endorsement of religion, even absent direct governmental coercion, will have the effect of altering a person's standing in the community because of his or her religious beliefs. These criticisms simply suggest the need to (1) better define

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176. See supra notes 118-19 and accompanying text.
177. Smith, supra note 170, at 305-06.
178. Id. at 308-09.
179. Id. at 306-307. Professor Smith provides as an example a Tennessee law invalidated by the Supreme Court which excluded clergy from serving in the legislature. See McDaniel v. Paty, 435 U.S. 618 (1978). This law affected the political standing of clergy because of their religion but it is unclear whether the law "communicated approval or disapproval of religion." Smith, supra note 170, at 306. The law could have been based on the notion that ministers are unfit for public office, that ministers are too important to be "sullied" by politics, or simply that government and religion should be separated. Id. at 306-07. The important point is that the inquiry into whether or not the law endorsed religion is a separate and distinct inquiry from whether the law impacted a person's political standing because of his or her religion. Id.
180. Smith, supra note 170, at 309.
181. See supra note 132 and accompanying text.
182. A governmentally sponsored "National Baptist School" would impact the po-
those circumstances where the government does endorse religion; (2) define when that endorsement amounts to the infringement of religious liberty; and (3) identify other forms of governmental behavior that infringe religious liberty apart from government endorsement of religion.183

Although these questions highlight the need for a further refinement of Justice O'Connor's analysis, they do not suggest that the analysis should be abandoned altogether. Certainly, Justice O'Connor's endorsement test identifies the appropriate concerns of the establishment clause more directly than the Lemon test.184 Accordingly, the remainder of this Article expands on those concerns and applies that analysis to governmental programs assisting parochial schools.

IV. A RELIGIOUS LIBERTY ANALYSIS

If the appropriate concerns of the establishment clause are the preservation of religious liberty and the separation of political standing and religious belief, establishment clause analysis should focus on identifying those governmental practices which implicate those concerns, not with concepts such as “advancement” and “endorsement.”185 The four general ways that a governmental practice can
infringe religious freedom are discussed below and then applied to parochial school aid statutes.

A. Penalizing, Prohibiting, or Mandating Religious Beliefs or Practices

The most direct form of governmental conduct which infringes religious freedom are laws which directly penalize, prohibit or mandate religious beliefs or practices. The Supreme Court has generally analyzed such cases under the free exercise clause, not the establishment clause.\textsuperscript{186} Historically, the Court has applied a balancing test to such cases and asks whether there is a compelling state interest justifying the burden on religious freedom.\textsuperscript{187} However, regardless of whether such cases are analyzed under the free exercise clause, the establishment clause, or both,\textsuperscript{188} religiously neutral parochial school aid statutes which provide financial or other educational assistance to private schools do not penalize, prohibit or mandate religious beliefs or practices.

B. Requiring Individuals to Forego Governmental Benefits Unless They Alter Their Religious Beliefs or Practices or Distributing Benefits Unequally Because of Religious Beliefs or Practices

The government infringes religious freedom when it unequally doles out benefits based on religious belief or when it requires individuals to modify their religious beliefs or practices in order to receive a governmental benefit.\textsuperscript{189} Such cases are also generally re-

\textsuperscript{186} See, e.g., McDaniel v. Paty, 435 U.S. 618 (1978) (state could not prohibit clergy from serving in state legislature); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state could not require Amish children to attend school until they reach the age of sixteen in violation of Amish religious tenants); Sherbert v. Verner, 374 U.S. 398 (1963) (state could not force a Seventh-Day Adventist to accept jobs requiring working on Saturday in order to collect unemployment compensation).

\textsuperscript{187} See Beschle, supra note 76, at 159-63 (discussing the Court's free exercise cases and the compelling state interest standard applied by the Court). But see Employment Division v. Smith, 494 U.S. 872 (1990) (the court did not apply the compelling state interest test while rejecting a free exercise challenge to a religiously neutral law prohibiting the use of narcotics.). In light of Smith, it is unclear what kind of analysis the Court will apply to future free exercise cases.

\textsuperscript{188} See supra note 144.

solved under the free exercise clause.\textsuperscript{190} Governmental programs providing assistance to public and private schools on a religiously neutral basis do not fall into this category because they do not require individuals to alter their religious beliefs in order to obtain a governmental benefit, nor do they distribute benefits unequally because of religious beliefs or practices.

\textbf{C. Placing Governmental Power, Prestige and/or Financial Support Behind a Particular Religion or Favoring Religion Over Non-Religion}

Governmental behavior which favors or endorses one religion over another or religion over non-religion infringes religious freedom because "[w]hen the power, prestige and financial support of the 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."\textsuperscript{191} Although this type of infringement of religious liberty is similar to Justice O'Connor's articulation of the endorsement test, it is not identical to the implementation of that test by Justice O'Connor. Contrary to her analysis, the appropriate question is not simply whether government is "endorsing" religion, which it arguably does whenever it supplies a benefit to religious groups, regardless of whether the benefit is also provided to non-religious groups, but whether the government endorsement actually infringes religious liberty.\textsuperscript{192}

\textbf{D. Using Tax Proceeds to Favor or Penalize Religious Beliefs or Practices}

The Supreme Court has stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."\textsuperscript{193} Even the most ardent separationists would have to concede, however, that this is a gross overstatement — otherwise police and fire protection could not be provided to churches or church schools.\textsuperscript{194} Nevertheless, the use of

\begin{itemize}
\item \textsuperscript{190} See Beschle, supra note 76, at 163.
\item \textsuperscript{191} Wallace, 472 U.S. at 70 (O'Connor, J., concurring) (quoting, Engel v. Vitale, 370 U.S. 421, 431 (1962)).
\item \textsuperscript{192} See infra notes 203-19 and accompanying text, for an application of this standard to religiously neutral parochial school aid statutes.
\item \textsuperscript{193} Everson v. Board of Education, 330 U.S. 1, 16 (1947).
\item \textsuperscript{194} See supra note 164, at 1676 n.11 ("[n]o commentator argues . . . that religiously affiliated schools could be denied governmental fire protection or sanitation service.").
\end{itemize}
tax funds to assist religious schools arguably infringes the religious liberty of those taxpayers who did not wish to support that religion. This contention is discussed in the next section of this Article.\textsuperscript{196}

A governmental practice that has none of the above effects, does not infringe religious freedom and therefore does not violate the establishment clause.\textsuperscript{198} The next section of this Article applies these prohibitions to parochial school aid statutes.\textsuperscript{197}

\textsuperscript{195} See infra notes 220-27 and accompanying text. Another commentator, who believes that governmental coercion should be the central concern of the establishment clause, has compiled a similar list of the various ways that government can infringe religious freedom by coercing religious belief. See Ward, supra note 142, at 1746-53.

On occasion, the Court has suggested that "political divisiveness" can lead to the invalidation of a governmental practice under the establishment clause. See, e.g., Lemon, 403 U.S. at 622-25, discussed supra note 34. At least one commentator, embracing a religious liberty analysis, has embraced that suggestion. See Feder, supra note 185, at 267-68. In recent cases, however, the Court has suggested that this doctrine should be limited to those instances involving "direct financial subsidies to parochial schools." Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). The Court has never, however, adequately explained how "political divisiveness" infringes religious liberty. See generally Choper, supra note 18, at 683-85. Professor Choper was correct when he concluded that "if a law serves genuinely secular purposes-or impairs no one's religious liberty by coercing, compromising or influencing religious beliefs-there is no persuasive reason to hold it unconstitutional simply because its proponents and opponents were divided along religious lines." Choper at 684.

\textsuperscript{196} Justice O'Connor would begin her analysis by asking whether the "actual purpose" of the challenged legislation, apart from its actual effect, is to "endorse or disapprove of religion," and she would invalidate any statute that fails this test. Lynch, 465 U.S. at 690 (O'Connor, J., concurring). This analysis, in addition to having all of the flaws inherent in any judicial inquiry into the subjective motivations of legislators (see Smith, supra note 170, at 283-86), also poses the wrong question. If any inquiry into legislative attempt is to be made, the better question would be whether the legislature acted for the purpose of infringing religious freedom by linking political standing with religious belief. After all, a legislature can endorse religion without necessarily violating the establishment clause. See supra notes 178-79 and accompanying text. Even this question, however, is unnecessary. A statute either infringes religious freedom or it does not. That question must be resolved, not by resort to the motives underlying the legislation, but how the statute has operated in practice. Simply put, "[m]otive based inquiry ... is an unprofitable constitutional exercise." Lively, supra note 18, at 686. See also Choper, supra note 18, at 687 (religious purpose alone, without more, should not invalidate legislation unless the law also infringes religious liberty).

\textsuperscript{197} Although the starting point of all establishment clause inquiries should be the same, i.e., does the governmental practice at issue fall into one of four categories enumerated above, the standards governing that determination will vary depending on the type of establishment clause case that is before the Court. The determination of what kind of religious symbols may be placed on government property, for example, or under what circumstances government may prohibit religious practices because they conflict with secular objectives, will be based on different set of specific criteria than those governing what kind of aid government may provide to religious schools. See Wallace v. Jaffree, 472 U.S. at 89 ("Our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.") (Burger, C.J., dissenting). This Article is limited to determining what
VI. RELIGIOUS FREEDOM AND PAROCHIAL SCHOOL AID

A. Educational Benefits Must be Provided on a Religiously Neutral Basis and Must Not Have a Substantive Content That Favors One Religion Over Another or Religion Over Non-Religion

First, if the government aids only parochial schools of certain faiths, or aids parochial schools more than public schools, that practice would violate the establishment clause because the government would be providing benefits, educational assistance, unevenly based on religious belief. In addition this practice would send a message that the government approves the religious affiliation of the schools that it is assisting and not the religious affiliation of the schools it is not assisting. Such practices would infringe religious freedom by making a person's political standing in the community (eligibility for educational benefits) dependent on religious beliefs. Accordingly, to avoid infringing religious freedom, the government must assist all private schools, regardless of religious affiliation, equally, and must not assist religious schools more than public schools.\(^\text{198}\)

Moreover, whatever form the assistance takes, it cannot convey the substantive message that the government prefers one religion over another or religion over nonreligion.\(^\text{199}\) Although such assistance would not necessarily coerce anyone to believe a certain way, it would place the power, prestige and financial support of the government behind religious belief such that there would be pressure upon nonadherents to conform to the officially approved religion.\(^\text{200}\)

\(^{198}\) kind of aid government can constitutionally provide to parochial schools and does not attempt to answer other establishment clause questions. However, the general categories of impermissible government behavior discussed above should be applied to all establishment clause questions.

Also beyond the scope of this Article is whether the aid to parochial schools (discussed in the next section), rather than being forbidden under the establishment clause, is ever required to be provided under the free exercise clause. See Paulsen, \textit{supra} note 18, at 358.

\(^{199}\) Applying different analyses, other commentators have reached similar conclusions. See Paulsen, \textit{supra} note 18, at 358 ("judicial inquiry should be directed toward making sure that the overall effect of government policy does not impermissibly tilt the financial scales involved in making the decision of whether or not to attend a religious school.") (applying equal protection analysis to establishment clause cases); Beschle, \textit{supra} note 76, at 184 ("clearly, aid to only one or any number of chosen [religious schools] would be impermissible.") (applying a pure endorsement, or "liberal neutrality" analysis); Marshall, \textit{supra} note 10, at 548 (aid to parochial schools "must be no greater than that provided all students, including those attending public schools") (applying a "symbolic" test to establishment clause cases).

\(^{200}\) For instance, by providing monetary assistance that has to be used by all beneficiaries for the purpose of understanding the Catholic faith.

\textit{See Wallace}, 472 U.S. at 70 (O'Connor, J., concurring) (\textit{quoting}, Engel v. Vitale, 370 U.S. 421, 431 (1962)).
B. Providing Secular Educational Materials And Instruction to Parochial School Children

When a state provides secular educational benefits, such as materials and equipment, or publicly funded secular instruction to children attending religious schools that is comparable to those benefits being provided to children in nonreligious schools, the state does not penalize religion, does not provide a government benefit unequally based on religious belief, and does not force any citizen to give up a religious belief in order to obtain a governmental benefit. More difficult questions are whether such aid impermissibly endorses the religious message of the private schools or impermissibly uses tax dollars to support religion.

1. To answer the first question, as long as the aid is earmarked for secular purposes, and is provided in a similar fashion to all private and public schools, the state is not favoring one religion over another or religion over nonreligion. However, this kind of aid was invalidated in Wolman v. Walter, and Meek v. Pittenger. In both cases, the Court reasoned that, by assisting the secular mission of the private schools, the state was also assisting the religious mission of the schools because those missions could not be separated. In neither case did the Court identify how religious liberty was infringed by such an indirect advancement of religious beliefs. By limiting the educational equipment and materials to secular purposes and by providing it evenhandedly among all religious and non-religious schools, the states were not communicating any message of approval or disapproval of anyone's religious belief.

For the same reasons, the state does not communicate a message of approval or disapproval of religion when it pays for public school

201. See Board of Education v. Allen (state providing secular textbooks to private school children), discussed supra note 26; Meek v. Pittenger and Wolman v. Walter (state providing secular educational equipment and materials to private school children), supra notes 48-54 and 60-75 and accompanying text.


203. 433 U.S. 229 (1977), discussed supra notes 60-75 and accompanying text.

204. 421 U.S. 349 (1975), discussed supra notes 47-54 and accompanying text.

205. See supra notes 53, 71 and accompanying text.

206. The Court simply assumed that the advancement of religion itself was a constitutional evil prohibited under the establishment clause. See 421 U.S. at 366; 433 U.S. at 250-51. See also supra note 146.

207. Such aid really "endorses" the proposition that the state wants all school children to have the best possible secular education (regardless of where they go to school and regardless of their religious beliefs), a purpose consistent with the establishment clause. See Paulsen, supra note 18, at 358.
teachers to provide secular education to children attending parochial schools, regardless of whether the instruction is provided inside or outside the classrooms of the parochial schools, as long as such instruction is provided on an equal basis to all schools. However, the Supreme Court has held in *Grand Rapids* and *Felton* that publicly funded instruction inside parochial school classrooms is unconstitutional.208 I have already demonstrated that the Court in *Felton* did not identify how the use of such teachers, or the monitoring of those teachers to guard against the transmission of religious beliefs, infringed religious liberty.209 As far as the programs in *Grand Rapids* are concerned, none of the reasons provided by the Court for the invalidation of those programs were sufficient to justify the conclusion that the government was infringing religious liberty in that case.

The Court in *Grand Rapids* offered three reasons why the funding of teachers to provide secular education in the private schools violated the establishment clause.210 First, the Court held that, although the programs were limited to secular education, even the best intentioned teachers may become inadvertently involved in transmitting religious beliefs when they teach in the pervasively sectarian atmosphere of the private schools.211 Assuming that the actual transmission of religious beliefs by publicly funded teachers would violate the establishment clause,212 the Court in *Grand Rapids* did not identify a single instance where such an illegal transmission of a religious message occurred. Moreover, because the statute explicitly prohibited the transmission of any such message, it would be illogical, absent evidence to the contrary, to conclude that the programs in *Grand Rapids* endorsed or approved any such message.

Justice O'Connor agreed that it was unconstitutional to pay the salaries of private school teachers to provide secular education at night to private school students because “[w]hen full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, . . . the program has the perceived and actual effect of advancing the religious aims of the church-related schools.”213 However, Justice O'Connor did not address why, even if such a program was perceived to, and actually did, “advance the religious aims” of the private schools, such an advancement infringed religious liberty. Because the aid was provided to all schools regardless of religious affiliation, and

208. See *supra* notes 95-112 and accompanying text.
209. See *supra* notes 149-53 and accompanying text.
210. See *supra* notes 99-103 and accompanying text.
211. 473 U.S. at 387.
212. See *supra* notes 199-200 and accompanying text.
213. 473 U.S. at 399-400 (O'Connor, J., concurring in part and dissenting in part).
because the statute explicitly prohibited the teaching of religion, the government was simply endorsing the proposition that religious schools would not be disqualified from receiving the aid because of their religious affiliation. Such an "advancement" does not favor one religion over another or cause nonadherents to believe that the government is approving or disapproving their religion. Accordingly, this kind of "advancement" does not infringe religious liberty.

The Court in *Grand Rapids* also held that the programs caused "the symbolic union of government and religion in one sectarian enterprise," and therefore were unconstitutional. The Court was concerned that both students and the public at large would perceive the government as endorsing the religious beliefs of the schools by aiding the secular education of the schools. However, the programs in *Grand Rapids* were offered to schools of all faiths and did not provide private school children with superior benefits to those provided children in public schools. Accordingly, a fully informed individual would know that the state was not preferring one religion over another or religion over non-religion. The erroneous perception by some students or members of the public that the state was endorsing the religious message of their particular schools does not justify the invalidation of a program which does not endorse any such message.

The third justification offered by the Court in *Grand Rapids* was that the programs provided an unlawful subsidy to the private schools because, by assisting the secular educational mission of the private schools, the Court was also advancing the religion mission of the schools. As with the equipment and materials invalidated in *Meek* and *Wolman* the Court did not explain how religious liberty is infringed by such an indirect advancement of religious belief. Moreover, the identical instructional programs that were invalidated in *Grand Rapids* would have been constitutional under *Wolman v. Walter*, had they been offered off the premises of the private schools, even though they would have subsidized the religious mission of the schools in exactly the same way. Accordingly, none of the reasons set forth by the Court in *Grand Rapids* justified the Court's

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214. 473 U.S. at 392.
215. *Id.* at 397.
216. In fact, the Court itself implicitly reached this same conclusion because it found that the programs were not enacted for a religious purpose in violation of the first prong of the Lemon test. *Id.* at 383.
217. *Id.* at 392-97.
218. See supra notes 203-07 and accompanying text.
219. See supra note 67 and accompanying text.
finding that the programs violated the establishment clause.

2. The other kind of religious freedom that could arguably be implicated by the providing of secular educational benefits on a religiously neutral basis to children in parochial schools is the freedom not to have one's tax dollars spent to support religion. 220 Presumably, if the Supreme Court is correct in concluding that it is impossible to assist only the secular education or mission of parochial schools without also assisting the religious mission, 221 then it could be argued that tax dollars of nonadherents should not be spent to assist the religious mission of the private schools. 222

If tax proceeds are distributed to all schools, religious and nonreligious equally, then no religious distinction is being made by the state and a person's standing in the political community is not impacted by his religious beliefs. 223 There is a constitutionally significant difference between infringing religious liberty by directly taxing a group because of its religious belief, or distributing the proceeds of tax collection to religious groups unequally, or using tax proceeds for religious purposes and using tax revenues to achieve secular goals on a religiously neutral basis. 224 Such a use does not infringe religious liberty because it does not link political standing to religious belief.

Additionally, it is quite often the case that government spends tax dollars to advocate messages that many members of the community might find objectionable, such as warnings about tobacco products or encouragement of various birth control options. However, such objections do not amount to first amendment violations. 225 It makes no sense "to treat the disbursement of . . . funds to religious institutions or individuals as any more coercive to taxpayers than other expenditures of tax monies that taxpayers, for religious or nonreligious reasons, may find objectionable." 226 Therefore, the use of tax proceeds to assist educational institutions on a religiously neutral basis

220. See supra notes 193-95 and accompanying text.
221. See supra note 217 and accompanying text.
222. Professor Choper has taken this position. See Choper, supra note 18, at 675, 679-80.
223. In fact, if the government were to withhold widely dispersed benefits to citizens solely because of their religious beliefs, such a practice might very well violate the free exercise clause. See Paulsen, supra note 18, at 358 and supra note 197.
224. See Ward, supra note 142, at 1753. For instance, using tax revenues to provide fire and police protection to churches raises no constitutional question. See supra note 194.
225. Although the Supreme Court has held that taxpayers have standing to raise establishment clause challenges solely because they are taxpayers, Flast v. Cohen, 392 U.S. 83 (1968), the Court has never held that the mere fact that their taxes have been used in violation of a person's religious tenants results in an establishment clause violation. Instead, the Court has correctly insisted on a showing that the governmental conducted funded by the tax violated the Lemon test, the endorsement test, or some other establishment clause principle.
226. Ward, supra note 142, at 1753.
does not infringe religious liberty.

Accordingly, the providing of secular educational equipment such as maps, globes, and computers, on a religiously neutral basis, as well as the funding of teachers to provide secular education to parochial school children, does not infringe religious liberty. Therefore, such programs do not violate the establishment clause.

C. Tuition Credits, Tax Benefits and Non-Educational Aid

If the government does not infringe religious liberty by providing educational assistance to parochial schools on a religiously neutral basis, it also does not do so by providing non-educational aid such as bus transportation, or grants for building repair, as long as the aid is provided to all private schools equally, is less than or equal to the aid provided to public schools, and is limited to secular purposes. A somewhat more difficult question is whether it is constitutional for a state to provide parents of private school children with tax credits or tuition reimbursements to defray the cost of sending their children to private schools. The most extreme example of such an aid program would involve the government reimbursing parents of children attending private schools for the cost of the secular education of their children. Such a program would subsidize the secular education of all children in the state regardless of where they attend school. If such aid is constitutional, the programs in Nyquist, Mueller, and Lemon would also be constitutional.

227. Of course, in any given community a religiously neutral statute may be implemented in such a way as to favor one religion over another or religion over non-religion. See Beschle, supra note 76, at 185. For instance; a systematic attempt by a state to allocate its best teachers to schools of a certain religious belief would make those schools more desirable to attend and therefore constitute an unconstitutional preferential endorsement of those schools. In such a situation, however, it is the implementation of the statute that would be enjoined, not the statute itself.


230. The Court in Nyquist invalidated a program that provided grants to private schools for the repair of buildings where the grants were not limited to secular use and could have been used to repair a chapel or pay the salaries of workers maintaining the chapel. 413 U.S. at 774.


232. Of course, any such aid must be provided equally to children attending all private schools, regardless of religious affiliation, and must be less than or equal to the amount of aid provided the public schools. See supra note 198 and accompanying text.

233. See supra notes 38-42 and accompanying text.
The governmental subsidization of the secular education of children in both public and private schools does not penalize religion, does not provide an unequal governmental benefit based on religious belief, and does not force any citizen to give up a religious belief in order to obtain a governmental benefit. Moreover, for the reasons discussed in the preceding section, simply using tax dollars to provide educational benefits on a religiously neutral basis does not infringe the religious liberty of taxpayers. Accordingly, such aid would violate religious liberty only if it endorsed religious beliefs to the extent that it caused nonadherents to believe that the government disapproved of their religion.

A statute that allowed the government to finance secular education for all children in the state would send a message that the government was not going to distinguish between religion and nonreligion in the area of secular education. Although such aid would certainly make it easier for religious schools to exist, perhaps advance their religious goals, and even cause entanglement between public and religious officials, as long as all parents in the state could send their children to public schools and receive a state paid-for education equal to or greater than the amount of subsidized education in the private schools, such aid would not favor one religion over another or religion over nonreligion. Accordingly, such aid would not infringe religious liberty, and therefore would not offend the establishment clause.

**Conclusion**

Starting from the premise that the core concern of the establishment clause is religious liberty, this Article has demonstrated that the traditional three-part test and Justice O'Connor's endorsement test do not provide adequate standards to evaluate whether governmental practices violate the establishment clause. However, the endorsement test is at least grounded in the correct principle that religious freedom is impaired when the government connects political standing and religious belief. Such a connection can occur only when the government penalizes, prohibits or mandates religious beliefs or practices; distributes benefits unequally because of religious beliefs or practices; or engages in other acts which favor or endorse one religion over another or religion over nonreligion.

Applying these principles to the Court's parochial school aid cases is not difficult. In none of the cases did the government (state or

234. See supra notes 89-93 and accompanying text.
235. See supra notes 25-34 and accompanying text.
236. See supra notes 225-26 and accompanying text.
federal) provide a benefit to a religious school that was not already provided to non-religious schools, and in none of the cases did the government favor any particular religious belief, or religion as compared to non-religion. Additionally, the statutes did not penalize or reward religious belief, or encourage anyone to adopt or not adopt religious belief. The most that can be said about all of these statutes is that they did not eliminate private religious schools from the category of schools eligible to receive governmental educational assistance. The failure to exclude these schools based on their religious affiliation does not infringe the religious liberty of any citizen and therefore does not violate the establishment clause.