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I. INTRODUCTION AND SCOPE

This paper concerns the theme of "access," which puts religious claims for admission to the public arena on the same basis as other players. This characterization creates a winsome tilt in the direction of fair play, sounding in equal protection, such that anyone suggesting otherwise has an uphill task not to sound churlish and ill-natured. This paper contends that, although religious organizations may be welcome to participate in various public efforts to serve the common good, so long as they do not use participation as an occasion for proselyting or institutional aggrandizement, they are not entitled to government funding except in certain narrowly circumscribed conditions that are the subject of much debate.

Because the debate is wide-ranging, it is necessary to set the limits of this paper. On the one hand, no one is seriously proposing that government support the churches and pay their clergy, nor would such a proposal be taken seriously if made. Whatever the Establishment Clause of the First Amendment[1] means, the last such arrangements for governmental support of churches in this country were terminated long ago by the few original states that had them.[2] New states were not admitted to the Union unless their constitutions conformed with the federal principle on this subject.[3] On the other hand, few people this side of Madalyn Murray O'Hair are contending that religious organizations should be disqualified as such from

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1 U.S. CONST. amend. I.

2 ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 75, 77-78 (1964) (Connecticut in 1818 and Massachusetts in 1833).

3 *Id.* at 154-55.

making important contributions to the achievement of public objectives of the common good through their efforts in education, health care, moral reform, and ethical advocacy. The main disputes—at least for purposes of this paper—concern what role hybrid institutions founded, sponsored, and maintained by religious bodies play in publicly funded programs. Hybrid institutions are not exclusively or predominantly "religious" in the way that churches, synagogues, and mosques are thought to be; they are not as exclusively religious as the law sometimes supposes,[4] but are also educational, medical, or social-welfare institutions as well.

Hybrid institutions are the present-day reminders that Christian churches were actively concerned with education, health care, and charitable succor of the needy. This active concern extended beyond their own members to the population in general. The concern occurred long before governments showed any general solicitude for the non-elite or any consistent responsibility for those functions. Even when government was concerned, it often called upon churches to discharge the responsibility, as the state-sponsored churches in France preferred to make use of nurses from Roman Catholic orders or Protestant deaconess houses.[5] It is government, not churches, that are the Johnny-come-latelies in these fields. As such, it is more than a little presumptuous for governments to be undertaking to instruct churches—via elaborate and often unrealistic and even self-contradictory regulations—how to do the work they were doing long before government took an interest in it. But that argument is independent of government funding, though it does have some implications for this discussion.

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4 "The churches . . . themselves are not 'exclusively religious' in the sense that the . . . regulations require of their 'integrated auxiliaries.'" Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 899 (1977).

5 4 ENCYCLOPAEDIA BRITANNICA 517 (15th ed. 1974).

II. DISTINGUISHING EDUCATION AND WELFARE

The law on religious access in the United States is curiously bifurcated between hybrid institutions of religion with education and hybrid institutions of religion with welfare. More accurately, the division is between institutions of religion with primary/secondary education and institutions of religion with higher education or welfare. A quick recapitulation of the law will make the distinction clear.

A. Welfare and Higher Education

The first case testing the application of the Establishment Clause to a hybrid institution was *Bradfield v. Roberts*.[6] That case involved the construction of an isolation ward on the premises of Providence Hospital with funds of the District of Columbia. Providence Hospital was owned and operated by the Sisters of Charity of the Roman Catholic Church. The Supreme Court rejected an Establishment Clause challenge to that grant in a rather wooden opinion based upon the following suppositions: (a) perusal of an organization's charter of incorporation reveals all that needs to be known about its nature and operation; (b) the mode of operation of a hospital is commonly known and generally recognized; (c) the religious beliefs of the proprietors thereof do not have any effect upon that mode of operation; (d) ecclesiastical supervision or control is not present, or if present does not affect its mode of operation; (e) the religious beliefs of the proprietors are not only irrelevant to the operation of the hospital, but it would be improper for the court to take cognizance of them; (f) the concern of the court with the establishment of religion is exhausted if the institution's charter makes no mention of religion and its services are not "confined to the members of that church"[7]; and, (g) the institution in question is subject to the control, not of the church, but "of the Government which created it" [in the sense of granting its corporate charter].[8]

None of these suppositions would be generally accepted today and should not have been accepted in 1899. Certainly no religious body should accept the assumption that its ethical teachings and religious requirements do not have, cannot have,

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6 175 U.S. 291 (1899).

7 *Id.* at 298.

8 *Id.* at 297-99.

and should not have any consequences for the operation of a hospital it owns and ostensibly manages. On the other hand, the embodiment of religious and moral norms in health care institutions—supported in part by public funds and treating non-adherents of that religion who may not subscribe to those norms—poses significant Establishment Clause questions with which some lower courts have struggled,[9] but with which the Supreme Court has not. *Bradfield* set the standard by which U.S. courts have since generally dealt with challenges to government funding of hybrid institutions of religion and welfare.[10] In time, the Court also applied this type of analysis to higher education.[11]

B. Elementary and Secondary Education

The case law dealing with elementary and secondary education followed a rather different course, after recognizing that private schools—both religious and non-religious—have a right to operate.[12] The Supreme Court found no Establishment Clause impediment in the public school district's supplying parochial school students with secular textbooks[13] or bus transportation.[14] *Everson v. Board of Education*[15] elicited the Supreme Court's first effort to spell out systematically what the Establishment Clause requires, In *Everson*, the Supreme Court formulated the so-called "no aid" test, stating that

> [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which *aid one religion, aid all religions, or prefer one religion over another*. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can

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9 Taylor v. St. Vincent's Hosp., 523 F.2d 75 (9th Cir. 1975); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973); O'Neill v. Grayson County War Memorial Hosp. Ass'n, 472 F.2d 1140 (6th Cir. 1973); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Meredith v. Allen County War Memorial Hosp. Ass'n, 397 F.2d 33 (6th Cir. 1968); Shulman v. Washington Hosp. Ctr., 319 F. Supp. 252 (D.C. 1970).

10 *See infra* text accompanying note 58.

11 *See infra* note 56.

12 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

13 Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).

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

15 *Id.*

> be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions*, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[16]

Although the *Everson* formulation was repeated three times,[17] it fell into desuetude until reasserted in 1989 by a narrow majority in *County of Allegheny v. ACLU Greater Pittsburh Chapter*.[18]

III. THE *LEMON* TEST: APPLICATION TO EDUCATION AND WELFARE

A. *The* Lemon *Test*

In 1971 the United States Supreme Court conceived of another way to apply the Establishment Clause. Whether it replaced or supplemented the earlier "no aid" test was not clear until the five-member majority in *Allegheny* reiterated the "no aid" formula from *Everson* and characterized the test in *Lemon v. Kurtzman*[19] as an effort to refine it: "First, the statute must have a *secular* legislative *purpose*; second, its *principal or primary effect must be one that neither advances nor inhibits religion*; finally, the statute must not foster 'an *excessive government entanglement with religion.*'"[20] In *Lemon* the Court found that various state programs that benefited parochial schools did not pass the test because the efforts by the state to monitor those programs to ensure that no aid was given to religion created excessive entanglement between the state and religion.[21] This approach has been called a "catch 22" test by some members of the Court.[22]

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16 *Id.* at 15-16 (emphasis added) (citations omitted).

17 McGowan v. Maryland, 366 U.S. 420 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961) (no dissent); McCollum v. Board of Educ., 333 U.S. 203 (1948).

18 492 U.S. 573 (1989).

19 403 U.S. 602 (1971).

20 *Id.* at 612-13 (emphasis added) (citations omitted).

21 *Id.* at 613-14. For a counterargument to this characterization, see discussion *infra* part III.D.1.

22 Bowen v. Kendrick, 487 U.S. 589, 615-16 (1988); Aguilar v. Felton, 473

B. Higher Education

On the same day in 1971 that the Court announced the result in *Lemon*, it also issued a decision affecting church-related higher education in *Tilton v. Richardson*,[23] reaching an opposite conclusion. The decision held that government aid to colleges was permissible, finding that religiously affiliated colleges were not pervasively sectarian in the way that parochial schools were. The distinction rested on findings that the colleges were not primarily engaged in religious indoctrination; their students were more mature and thus less susceptible to indoctrination, and they were not required to attend college by compulsory education statutes.[24] While these distinctions may be pertinent, they do not cut neatly between the Twelfth and Thirteenth years of schooling. Since then, decisions on Establishment issues in higher education have followed *Tilton*, such as *Hunt v. McNair*[25] and *Roemer v. Board of Public Works*,[26] while lower education cases have, by and large, followed the course set by *Lemon*.

C. The Parochial School Cases

After the Supreme Court struck down in *Lemon* a program from Rhode Island for supplementing the salaries of parochial school teachers for teaching secular subjects[27] and a program from Pennsylvania for the purchase of "secular education services" from parochial schools,[28] various states sought ways of easing the financial burdens of parochial schools that the Supreme Court might find acceptable, but without much success.[29]

U.S. 402, 420-21 (1985) (Rhenquist, J., dissenting).

23 403 U.S. 672 (1971).

24 *Id.* at 685-86.

25 413 U.S. 734 (1973).

26 426 U.S. 736 (1976).

27 DiCenso v. Robinson, 316 F. Supp 112 (D.R.I. 1970), *aff'd*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

28 Lemon v. Kurtzman, 310 F. Supp 35 (E.D. Penn. 1969), *rev'd*, 403 U.S. 602 (1971).

29 *See* Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Mueller v. Allen, 463 U.S. 388 (1983); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); New York v. Cathedral Academy, 434 U.S. 125 (1977); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Public Funds for Pub. Sch. v. Marburger, 417 U.S. 961 (1974); Wheeler v. Barrera, 417 U.S. 402 (1974); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413

Some thought a breakthrough had occurred (whether viewing it with approval or alarm) when the Supreme Court sustained a Minnesota plan permitting a tax deduction to parents for expenditures for education whether in private or public schools in *Mueller v. Allen*.[30] But two years later, programs from New York and Michigan that sent public school teachers into parochial schools were struck down by a bare majority on the grounds that the teachers might be led by their parochial surroundings to introduce sectarian teaching into their work.[31] The rationale was unconvincing since it is hard enough to get *parochial* school teachers to teach religion in parochial schools, let alone *public* employees. The Court's effort to apply *Lemon* to increasingly subtle and ingenious programs produced increasingly splintered results. A striking example is *Wolman v. Walter*,[32] which required a fifty-four-fold table to report the votes of nine justices on six programs.

The Court has been unwilling to ban all forms of aid or to permit all forms of aid. Instead it has been groping between these extremes for a way to recognize and assist the public services rendered by parochial schools without opening the gates to such substantial or direct subsidization as would clearly be state support to religious bodies for the advancement of their religions. One rationale the court has used is the child benefit theory, under which secular textbooks and bus transportation are made available to all children regardless of the schools they might attend.[33] That theory formed the rationale of the Elementary and Secondary Education Act of 1965,[34] which was the first program of substantial federal aid to education and which included some parochial students in its benefits. It has informed the Court's later decisions, such as *Wolman*,[35] where resources that a pupil might be able to obtain from a public library were permissible, but larger resources, such as sets of encyclopedias and globes of the world—that would not

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U.S. 756 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).

30 463 U.S. at 388.

31 *Aguilar*, 473 U.S. at 402; *Grand Rapids*, 473 U.S. at 373.

32 433 U.S. 229 (1977).

33 *See* Everson v. Board of Educ., 330 U.S. 1, 118-19 (1947); Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968).

34 Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

35 433 U.S. at 229.

be obtainable by individual pupils—were deemed institutional acquisitions and were not allowed.[36]

Some members of the Court have found some of the Court's distinctions perplexing, if not anomalous, and indeed the justices in the majority have not always been very articulate in explaining their reasoning.[37] However, a pattern is discernible in the Court's decisions: the Court has generally invalidated direct monetary transfers to parochial schools and the grant or loan of equipment that would enhance the institution or expand its realty. Similarly the Court has generally rejected the assignment of public employees to parochial school premises, though its rationale was not as persuasive as another might have been: i.e., that such programs have the effect of expanding the staff of the school with adjunct personnel that in effect add to its faculty. Whether the Court will move in the direction of approving so-called "voucher" plans for enabling parents to choose among public and private schools remains to be seen. The most recent such decision of the Court, *Zobrest v. Catalina Foothills School District*,[38] may be a straw in the wind pointing toward acceptance of a "voucher" arrangement. In *Zobrest*, a deaf high school student was denied the services of a sign-language interpreter solely because he attended a religious school. The Supreme Court held that the student could not be denied such publicly-financed services to which he was entitled solely because he chose to use them at a sectarian school. This holding, said the Court, flowed from the earlier decisions of *Mueller v. Allen*[39] and *Witters v. Washington*.[40] From these earlier cases the *Zobrest* Court derived the principle that any benefit flowing to the sectarian institution did so as a result of individual choices of recipients who were free to use them at any school, public or private, and any such benefit was incidental to the aid program and did not violate the Establishment Clause.[41]

"Pervasively sectarian" is the shorthand rubric the Court has used for its distinction between those church-related agen-

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36 *Id.*

37 Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rhenquist, J., dissenting).

38 113 S. Ct. 2462 (1993).

39 463 U.S. 388 (1983).

40 474 U.S. 481 (1986) (holding that a blind student entitled to educational aid could not be denied it because he wanted to use it for tuition at a Bible college for training as a missionary).

41 *Zobrest*, 113 S. Ct. at 2466-68.

cies that can receive direct government aid and those that cannot. Parochial schools are said to be so pervasively sectarian that any aid they receive would inevitably redound to the advancement of their religious purpose.[42] Institutions of higher education are not thought by the Court to be of that character, nor are social welfare or health care agencies, as evidenced in the Court's most recent wrestling with this issue, which involved a program that had elements of both welfare and education. That is the case of *Bowen v. Kendrick*.[43]

D. Bowen v. Kendrick

At issue in this 1988 decision was the Adolescent Family Life Act (AFLA),[44] a 1981 program of federal grants to public and nonprofit private agencies "'for services and research in the area of premarital adolescent sexual relations and pregnancy.'"[45] The grants were for "two types of services: 'care services,' for the provision of care to pregnant adolescents and adolescent parents, and 'prevention services,' for the prevention of adolescent [pregnancy]."[46] Among these services were some described as "necessary services": "pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and . . . 'educational services relating to family life and problems associated with adolescent premarital sexual relations.'"[47] The program was designed to "serve several purposes, including the promotion of 'self discipline and other prudent approaches to the problem of adolescent premarital sexual relations,' . . . the promotion of adoption as an alternative for adolescent parents," and other valuable services.[48]

In addressing these problems, Congress looked beyond governmental action, stating:

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42 Bowen v. Kendrick, 487 U.S. 589, 610-13 (1988). For the text of Chief Justice Rehnquist's proposition, see *infra* note 60 and accompanying text.

43 487 U.S. at 589.

44 42 U.S.C. § 300z (1988).

45 *Bowen*, 487 U.S. at 593 (quoting S. REP. NO. 161, 97th Cong., 1st Sess. 1 (1981)).

46 *Id.* at 594 (quoting 42 U.S.C. §§ 300z-1(a)(7), (8) (1988)).

47 *Id.* (quoting 42 U.S.C. § 300z-1(a)(4) (1988)).

48 *Id.* at 593 (quoting 42 U.S.C. § 300z(b)(1) (1988)).

> [S]uch problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives; . . . .[49]

Grant applicants must describe how they would involve these various entities in the provision of the services funded by the Act.[50]

Federal taxpayers and others brought the *Bowen* suit, charging that the Act violated the Establishment Clause. The federal district court applied the *Lemon* test and found that the Act failed to pass the second prong. It had the direct and immediate effect of advancing religion because it expressly required grantees to involve religious organizations in the provision of services. The Act permitted religious organizations themselves to be grantees, thus enabling them with federal funds to teach adolescents about issues that could be considered "fundamental elements of religious doctrine," and contained no restrictions whatever against the teaching of "religion *qua* religion" or the inculcation of sectarian doctrines.[51] The court also concluded that because AFLA funds were used largely for counseling and teaching, overly intrusive monitoring would be needed to insure that religion was not advanced by such programs, thus violating the "excessive entanglement" prong of the *Lemon* test. For these reasons, the court found the Act unconstitutional on its face and as applied.[52]

The U.S. Supreme Court agreed to hear the case, and the opinion of the five-member majority was delivered by Chief Justice Rehnquist. That opinion followed the district court's approach of viewing the statute "on its face,"[53] and, using the same *Lemon* test, reached an opposite result. The Court concluded that "the services to be provided . . . are not religious in character,"[54] and that Congress was not precluded from enlisting the help of religious organizations—along with nonreligious organizations—in solving the problems to which the Act was

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49 *Id.* at 595 (quoting 42 U.S.C. §300z(a)(8)(B) (1988)).
50 *Id.* at 596.
51 *Id.* at 598-99.
52 *Id.* at 598-99.
53 *Id.* at 598.
54 *Id.* at 604.

addressed.[55] The Court quoted one of its higher-education cases to underscore this point: "'[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.'"[56] This was a quintessential expression of the "access" concept.

The *Bowen* Court relied on *Bradfield v. Roberts*[57] for the proposition that a church-related hospital could be aided in providing health care services because its affiliation with a church did not "alter the purely secular legal character of the corporation, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter."[58] The Court went on to say that even if the statute was neutral on its face, care must be taken that "direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion."[59] The Court assured that result by utilizing the "pervasively sectarian" rubric:

> One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian." We stated in *Hunt* [*v. McNair*] that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ."
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> In this case, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to "pervasively sectarian" institutions . . . . [W]e do not think the possibility that AFLA grants may go to religious institutions that can be considered "pervasively sectarian" is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations. We think the District Court was wrong in concluding otherwise.
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> Nor do we agree with the District Court that the AFLA necessarily has the effect of advancing religion because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents. Of course, we

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55 *Id.* at 606-07.

56 *Id.* at 608 (quoting Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 746 (1976)).

57 175 U.S. 291 (1899).

58 Bowen v. Kendrick, 487 U.S. 589, 609 (1988) (paraphrasing *Bradfield*, 175 U.S. at 298).

59 *Id.*

> have said that the Establishment Clause does "prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to "advance the religious mission" of the religious institution receiving aid . . . . But nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination.
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> . . . .
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> We also disagree with the District Court's conclusion that the AFLA is invalid because it authorizes "teaching" by religious grant recipients on "matters [that] are fundamental elements of religious doctrine," such as the harm of premarital sex and the reasons for choosing adoption over abortion . . . . [T]he possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion . . . . The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.[60]

The Court took note of the fact that there was no explicit prohibition in the text of the Act against the use of federal funding for religious purposes, but the Court observed that there was also "no intimation in the statute that at some point, or for some grantees, religious uses are permitted."[61] Having determined that the Act was constitutional on it face, the Court

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60 *Id.* at 610-13 (citations omitted).

61 *Id.* at 614.

remanded the case to the district court to determine whether it was being applied in a constitutional manner.

Justice O'Connor, who was clearly the majority's swing vote, wrote a concurring opinion that suggested some sympathy for the views of the minority:

> [A]*ny* use of public funds to promote religious doctrines violates the Establishment Clause . . ., [and] *extensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses. For that reason, appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of "the unwavering vigilance that the Constitution requires against any law 'respecting an establishment of religion.'"[62]

Justice Kennedy, joined by Justice Scalia, wrote a concurring opinion to try to narrow the scope of the remand. He insisted that if AFLA funds were shown to be going to a few "pervasively sectarian" institutions, that should not invalidate those grants.[63] He maintained that "[t]he question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant."[64]

1. The dissent's view in Bowen

Justice Blackmun presented a vehement dissent, joined by Justices Brennan, Marshall, and Stevens. He began with several examples of AFLA grantees' engaging in explicitly religious indoctrination of persons coming to them for federally funded services.[65] He found fault with the majority's analysis that focused on the words of the statute and thus did not confront the array of evidence of "real-world events" that spelled out the Act's operation.[66] The majority had virtually disregarded the entire record compiled in the court below and had contented itself with "assumptions and casual observations about the character of the grantees."[67] He also found fault with the majority's use of the "pervasively sectarian" rubric as a way to avoid dealing with the actual operation of a wide range of reli-

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62 *Id.* at 623 (O'Connor, J., concurring) (quoting the dissent).
63 *Id.* at 624 (Kennedy, J., concurring).
64 *Id.* at 624-25 (Kennedy, J., concurring).
65 *Id.* at 625-26 (Blackmun, J., dissenting).
66 *Id.* at 627-28 (Blackmun, J., dissenting).
67 *Id.* at 629 (Blackmun, J., dissenting).

giously affiliated organizations, in which on a "continuum of 'sectarianism' running from parochial schools at one end to the colleges . . . in *Tilton*, *Hunt* and *Roemer* at the other, the AFLA grantees described by the District Court clearly are much closer to the former than to the latter."[68]

The Court's decision, he insisted, was a "sharp departure from our precedents."[69] Aid programs providing "nonmonetary, verifiably secular aid" had been upheld more readily in the past than direct cash subsidies, which required much closer scrutiny to make sure that the funds were not used to advance religion.[70] But AFLA authorized "various forms of outreach, education and counseling services . . . in ways previously held unconstitutional."[71] For instance, the Court had previously approved the purchase for use by pupils in parochial schools of secular textbooks approved for use in public schools, whereas there was no such requirement regarding teaching materials purchasable under AFLA. Justice Blackmun stated:

> The AFLA, unlike any statute the Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment . . . .
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> . . . .
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> . . . Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature. Not surprisingly, the record is replete with observations to that effect. It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes . . . .
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> . . . .
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> . . . There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with

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68 *Id.* at 631-33 (Blackmun, J., dissenting).
69 *Id.* at 634 (Blackmun, J., dissenting).
70 *Id.*
71 *Id.*

> the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food or shelter.[72]

Justice Blackmun also disagreed with the majority's characterization of the "entanglement" prong of the *Lemon* test as a "catch 22."[73] Noting that it was still part of the Court's Establishment Clause standard, he wrote, "[t]o the extent any metaphor is helpful, I would be more inclined to characterize the Court's excessive entanglement decisions as concluding that to implement the required monitoring, we would have to kill the patient to cure what ailed him."[74] In conclusion, Justice Blackmun addressed the statute in terms of Justice O'Connor's "endorsement" analysis:

> The AFLA, without a doubt, endorses religion . . . . [T]he statute creates a symbolic and real partnership between the clergy and the fisc in addressing a problem with substantial religious overtones. Given the delicate subject matter and the impressionable audience, the risk that the AFLA will convey a message of Government endorsement of religion is overwhelming. The statutory language and the extensive record . . . make clear that the problem lies in the statute and its systematically unconstitutional operation, and not merely in isolated instances of misapplication. I therefore would find the statute unconstitutional without remanding to the District Court.[75]

IV. CRITIQUE AND COMMENTARY

The judiciary has difficulty dealing with institutions and activities of a mixed character, where religious functions and purposes are mingled with secular functions and purposes. Indeed, some functions or purposes may at the same time be *both* secular and religious. The courts have trustingly embraced the simplifying fiction that the secular can be sorted from the religious easily and clearly in religiously affiliated hospitals, colleges, and social-welfare institutions, though not in parochial schools. But by neatly dividing the aid-eligible sheep from the non-eligible goats (and figuratively throwing the latter off the

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72 *Id.* at 638-41 (Blackmun, J., dissenting).
73 *Id.* at 649 (Blackmun, J., dissenting).
74 *Id.*
75 *Id.* at 652 (Blackmun, J., dissenting).

fleeing droshke to the wolves to save the former), this fiction may do a disservice to both sides. Parochial schools do perform secular functions, on the one hand, and church-related welfare agencies and colleges are not as devoid of religious purposes, atmosphere, and activities as the fiction might suggest. That is one reason, presumably, that Congress thought religious agencies might have a uniquely effective contribution to make in modifying adolescent motivation and behavior intended in the AFLA. But if only those church-related agencies that are indistinguishable from their "secular counterparts" are eligible to participate in the program, how is the unique contribution of the *religious* agency to be made? The expectation that religious agencies, in order to qualify for federal aid under the Act, will be duly sanitized of any religious elements is the other half of the judicial fiction. If the fiction becomes *fact*, and the religious agencies *are* sanitized of any religious elements, then the unique contribution that religion might make could well be eliminated.

This paradox simply underscores the anomaly of government's hiring churches to perform "secular" services for the public. If the churches remain true to their religious mission, the government will be paying for religious as well as secular services and will thereby be aiding in the promulgation of religion. But if churches drop the religious part of their work, they may be failing their own distinctive role (and may not do the secular part too well either). However, the churches may have founded and maintained some of these "mixed" entities precisely to serve the common good in a nonsectarian way and not be seeking to advance religious or sectarian purposes thereby. In those instances the churches would not object to the sanitizing of such institutions in order to qualify for federal resources that would enable them to serve those in need in the general population and to serve more of them and serve them better.

If that is indeed the case with certain church-related agencies and institutions, then they can be set aside as not posing a church-state problem. Those are the instances in which the judicial fiction is not fiction but fact, and in those instances the entities are—for all practical purposes—virtually secularized. Along that path have gone Yale, Harvard, Princeton, Columbia-Presbyterian Hospital, Methodist Hospital (of Brooklyn, of Indianapolis, etc.) and many others. They were not secularized solely by the attractions of tax support, though that has been

the express purpose of the reorganization of Fordham University and other institutions founded and operated by religious orders that have put lay persons on their boards of trustees. When an institution seeks to appeal to a broader public for its clientele and support, it begins to shape itself to fit the expectations of that broader public and so becomes less responsive to the intentions of the founding church. That process is an inevitable gravitational gradient that will draw the institution away from the church because it requires greater energy to maintain the institution as an effective *religious* entity than to succumb to the pressures for conformity to the expectations of the general public. The strictures that rightfully accompany governmental support only make that process of secularization more rapid.

So a church that wishes to maintain a religious thrust and content to its institutions of education or welfare is making that task much harder for itself by accepting the support of the public fisc and the requirements that properly go with it. But, some may ask, is that the look-out of the state? If the church wants to take that risk, why not let it? Is it the responsibility of the courts, in applying the Establishment Clause, to keep the churches and their institutions "pure and undefiled?" Thomas Jefferson thought it was. In his famed Bill for Establishing Religious Freedom (in Virginia) he argued: "it [state sponsorship of religion] tends to corrupt the principles of that very religion it is meant to encourage . . . ; though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way."[76] James Madison, in his opposition to Patrick Henry's bill for public support of teachers of the Christian religion, insisted that that proposal was improper "[b]ecause experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[77] The entire thrust of both these seminal historic adjurations was that government had no business *offering* preferences and emoluments to religious bodies, whether they accepted them or not. That conviction is firmly endorsed by many Americans

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76. ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 740 (4th ed. 1992).

77. Everson v. Board of Educ., 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting) (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 7 (circa June 29, 1785)).

today who adhere to the dicta in *Everson* that government cannot "pass laws which *aid one religion, aid all religions or prefer one religion over another.*"[78]

The very terms on which church-related schools and agencies are allowed access to public programs and government funding are designed to render them nonsectarian and spiritually innocuous—virtually identical with the public and nonreligious private entities to which they should be a corrective, examplary and challenging influence. How can they offer their distinctive and unique witness and service if they are wired into the very structure that needs improvement? On the other hand, they can play a more ameliorative role as light or leaven by preserving their own faith-fueled and gospel-formed devotion to selfless service that—at its best—has marked the churches' contribution to human welfare through the centuries, primarily when they have been reliant upon the volunteer efforts of the faithful.

There are those who would resolve the paradox by allowing the church-related institutions or agencies to retain their full religious character, even though supported in part by government funding. That was the solution effected by Congress in the aptly designated Church Amendment (named after Senator Frank Church, D-Idaho). That amendment permitted church-related hospitals to refuse to allow sterilization or abortions even though funded by Hill-Burton funds "if the performance of such procedure . . . is prohibited by the entity on the basis of religious beliefs or moral convictions."[79] Somehow that logic did not seem to apply to Bob Jones University, which lost its tax exemption for trying, as a corollary of its faith, to prohibit

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78. Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (emphasis added). The most recent official expression on this subject by a major Protestant body was the Policy Statement adopted by the 200th General Assembly of the Presbyterian Church, covering a wide range of church-state issues and stating that

> [s]ince each state guarantees the right to a free public elementary and secondary education and maintains universally accessible institutions for that purpose, we oppose as a matter of public policy the use of substantial public funds to support private educational systems, including tax deductions or credits and use of educational vouchers.

God Alone Is Lord of the Conscience, POLICY STATEMENT, 200TH GEN. ASSEMBLY, PRESBYTERIAN CHURCH, U.S. 32 (1988).

79. Health Programs Extension Act of 1973 § 401(b), PUB. L. NO. 93-45, 87 Stat. 91 (codified as amended in scattered sections of 42 U.S.C.).

interracial dating and marriage among its students and faculty.[80]

V. THE EDGE OF RELIGIOUS LIBERTY

Religious liberty means that religious bodies and their adherents should be able to pursue their faith-related goals, chosen patterns of devotion, and obedience to their spiritual vision without outside interference or inhibition, so long as they do not clearly jeopardize public health or safety or the like rights of others. That is the message of the Free Exercise Clause of the First Amendment[81] (or it was until the Supreme Court revised it on April 17, 1990, in *Employment Division v. Smith*[82]). But when they take the whole population into partnership in that enterprise through some form of tax support, the situation changes, and the Establishment Clause, which is the other half of the First Amendment's provision about religion, comes into play. The message of the Establishment Clause is that government should not sponsor or promote the promulgation of any religion or show favoritism for one religion over another or favor religion over the absence of religion.

But how does that happen if government simply allows the tax dollars of a portion of the population to finance the services they need—and to which they are entitled—in institutions in which they are "at home" and feel more comfortable than they would in the sterile, or even amoral, settings of public institutions? For example, elementary schooling is one of the most vital services in modern society and is required by law for all children. It is a service that many public institutions are not doing very well, partly because of bureaucratization, unionization, and homogenization, partly because of the strictures that apply to tax-supported institutions (nondiscrimination, due process, "sunshine" rules, etc.), and partly because they must accept and try to teach the children that no one else wants to teach. If private, including church-related, schools want to share in public revenues, they are buying into the same structure and conditions that produced some of the ailments of public education. The way to avoid those ailments is to avoid one of the main causes, the public fisc and its requirements.

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80. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
81. U.S. CONST. amend. I.
82. 494 U.S. 872 (1990).

That is not the only consideration. In the Nineteenth Century, as elementary education was becoming systematized and publicly supported, churches faced a significant policy choice. How would they carry on their task of inculcating the faith in the children of the faithful? Protestants, by and large, were content to continue supplementing general education (in the burgeoning public schools) by religious education in the church on Sundays. It was easy for them to make that choice because they were the dominant element in society, and the public schools at the time reflected their religious views and culture. They felt "at home" in the public schools in a way that Roman Catholics and Jews did not; in fact, the public schools were almost like "parochial schools" for the Protestant majority. So Roman Catholics (and later some of the more orthodox Jews) undertook the herculean task of setting up private elementary schools for the general and religious education of their children. So well have they succeeded that today their schools are often outperforming the public schools.

But if the decision should now be made to provide public support for those private schools, it would mean that the public would be aiding and advancing one particular mode of religious education to the disadvantage of those religious groups who had put their reliance in another mode. The natural consequence would be that other religious groups would be drawn to the favored mode of inculcation (as many of them are already, even without public subvention). Public schools would fall even farther behind, having to try to teach the dwindling population composed increasingly of the most intractable pupils rejected by the various private systems and with dwindling resources to do so. This would not only be catastrophic for the education of the public as a whole but would be detrimental to the private schools themselves if they began, as they surely would, to suffer some of the same strictures that have afflicted public schools, because they would begin to become subject to some of the same causes.

The same principles apply, perhaps less acutely, to the fields of welfare and higher education. If churches are trying to do something inspired by their faith-vision, something unique and significantly different from the generally accepted way of doing things, then they are asking for trouble by going into partnership with the government. However inviting the prospect, and however accommodating the government may seem to be (at the time), *tax money is political money*. The rules may

change without notice after the church has grown into a pattern of dependency that no longer leaves it as free to choose another path. Partnerships with government are unequal partnerships because the government is always the senior partner. These are unstable partnerships because the slope of dependency increases with time, leaving the church less and less able to effectuate its original spiritual vision, with a continuous attenuation of its proprietorship.

There are those who imagine ingenious new ways to work out such partnerships that are designed to mitigate these hazards, but the bottom line is that the government remains accountable for the use of public resources and so it cannot simply abandon responsibility for what the private partner does. On the contrary, it is the nature of bureaucracy to centralize, rationalize, routinize, and systematize that for which it is responsible, and to expand the area of its responsibility. Sooner or later the private partner finds itself pressed into an ever smaller compass, devoting more and more of its attenuating energies to carrying out routine administrative tasks and less and less to embodying its spiritual vision. Therefore, the course of wisdom for any church-related enterprise seeking to pursue a spiritual vision might be to avoid like the plague any entanglement with government.

Whether a church eschews the path of dependency on government or not, citizens of other faiths and those of no faith have a legitimate concern that the resources, which they contribute under duress of law to serve the common good, are not used in such a fashion as to advance religious doctrines that they do not share or to aggrandize the institutions that promulgate those doctrines, either through enhancing the realty or expanding the personnel thereof. As Thomas Jefferson wrote in the Virginia Bill for Establishing Religious Freedom:

> [T]o compel [anyone] to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness.[83]

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83. Everson v. Board of Educ., 330 U.S. 1, 13 (1947) (quoting 12 Hening, Statutes of Virginia 84 (1823)).

And James Madison likewise advised:

> Who does not see that the same authority which can establish Christianity . . . may establish with the same ease any particular sect of Christians . . . ? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[84]

In addition, if government contracts with private, religiously affiliated providers for public services that citizens of various faiths or of no faith may need, some citizens may resist going to what they may view as a false or alien faith-group for those services. While adherents of the provider's faith-group may find that setting more comfortable, non-members may find it correspondingly uncomfortable. If the argument about comfort works in the first instance, it cuts both ways. The upshot is that no one should have to go to or through a religiously affiliated entity to obtain the civic benefits to which he or she is entitled. This means that there should be public or nonsectarian private alternatives available for the provision of civic welfare or educational services.

VI. CONCLUSION

Religious people and organizations have vital contributions to make to society. They should be encouraged to make them—*mainly on a volunteer basis*. For the public to pay a religious body to do so introduces an element that, sooner or later, will impede the religious body in making its distinctive contribution that flows from its spiritual vision and will inhibit the civic community from developing nonsectarian sources for meeting the needs of all its citizens. While contracts for services with religiously affiliated providers may be a useful way for the civic community to meet its needs on a short-term or emergency basis, in the long run such arrangements are inherently unstable, unequal, and detract from the ability of both church and state to fulfill their respective functions.

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84. *Id.* at 65 (Rutledge, J., dissenting) (quoting MADISON, *supra* note 77, ¶ 3).