BYU Law Review

Volume 1986 | Issue 2 Article 6

5-1-1986

Political and Religious Disestablishment

Michael W. McConnell

Political and Religious Disestablishment

*Michael W. McConnell**

SUMMARY OF CONTENTS

---

*Assistant Professor of Law, The Law School, The University of Chicago. Readers should be warned that as a government lawyer I wrote briefs and/or argued in many of the Supreme Court cases of the 1985 and 1986 Terms discussed in this paper, and assisted in the drafting of the federal cost principles and regulations regarding political advocacy by grantees and participation in the Combined Federal Campaign, also discussed. While my views obviously were influenced by these experiences, this paper does not represent the government position, but solely my own.

I wish to thank my colleagues David Currie, Richard Epstein, Geoffrey Miller, Richard Posner, Geoffrey Stone, and Cass Sunstein for their helpful comments on an earlier draft.

Politics and religion have much in common. They involve the most fundamental matters in human affairs, yet traditionally they have been considered unfit subjects for polite dinner conversation. They animate the largest and most powerful of social institutions, yet at the same time are regarded as personal and private. In the legal context, political and religious speech are the most highly protected of all forms of expression, yet they are also subject to surprisingly frequent and intrusive government regulation. In this article I will explore one area of government regulation of speech common to politics and religion: restrictions on public assistance to the private propagation of political and religious opinion.

In this area, the values of the first amendment appear to tug in opposite directions. On the one hand, our legal system gives the widest possible latitude to political and religious speech. On the other, the system guards against government sponsorship of "private" political and religious speech and seeks to prevent government's prestige and resources from being used to support particular faiths or positions. In the realm of constitutional law, we thus see two different and recurring scenarios. In one, citizens or taxpayers object to governmental decisions that force them to support the propagation of private religious or political opinions with which they disagree. In the other, citizens who wish both to engage in religious or political advocacy and to receive government support for their activities challenge restrictions designed to prevent their use of government resources. Where religious speech is involved, these two types of cases are conveniently classified as "establishment" cases and "free exer-

cise" cases. In the political context, both types are treated under the single heading of "free speech."

This article analyzes and compares the treatment accorded government support of religious and political advocacy. In part this will be a study in constitutional law, for the courts have, not surprisingly, been among the most active of governmental bodies in developing policy in this area. But I will also examine the policies and decisions of other branches of government that serve the analogous purpose of distinguishing private from government-sponsored speech, whether or not these policies would be constitutionally compelled.

This article focuses on government support and regulation of private speech. I will not deal with the related problem of restrictions on the government's own direct communicative activities, such as public information or congressional liaison.[1] To be sure, government speech involves some of the same issues as private speech under both the first amendment[2] and federal statute.[3] Government speech, however, raises additional problems not common to government-subsidized private speech. Democratic processes require that government officials sometimes engage in political advocacy in their official capacities, thus making lines between the permissible and impermissible difficult to draw. No such justifications extend to government funding of private advocacy.[4] Nor would such justifications extend to official government religious speech.

A recurring theme in this article is the difficulty of distinguishing between governmental "support" and governmental "neutrality" when government plays a pervasive role in ensuring the production of both public and private goods. The problem

---

1. *See generally* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); M. YUDOF, WHEN GOVERNMENT SPEAKS (1983).

2. *See, e.g.*, Mountain States Legal Found. v. Denver School Dist., 459 F. Supp. 357 (D. Colo. 1978); Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed for want of a substantial federal question*, 439 U.S. 1060 (1979).

3. For example, 18 U.S.C. § 1913 (1982) provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress.

4. *See* Shiffrin, *supra* note 1, at 594-95.

would be much simpler in a system in which government could disturb the prepolitical norm only when the result is to enhance overall social welfare. In such a system, the larger question of preventing inefficient aid of any sort would subsume the problem of government support for the propagation of opinion. However, where the government is involved without constitutional constraint in promoting both the public and the interests of worthy (or influential) private groups, a particularized analysis is needed for first amendment purposes to distinguish between public and private.[5]

The political and religious aspects of this question are not usually treated together.[6] In part this may be because the disestablishmentarian focus of the religion cases has contrasted so sharply with the libertarian focus of the political free speech cases. The result has been to obscure the common elements in these two fields of first amendment law, to the detriment of both religious and political free speech doctrine. Attention to the religious analogy would increase awareness of the dangers of governmental support for private political advocacy. Perhaps more strikingly, religious establishment doctrine would benefit from an appreciation of the coercion which results from the denial of "aid" to institutions and individuals who represent a religious outlook. These elements have been recognized far more clearly in the political free speech than in the religious context.

In this article, I will first consider textual arguments under the first amendment and analyze the Supreme Court's current doctrine on the issue of government aid for political and religious advocacy. I will then examine current treatment of the problem as organized according to the types and modes of funding. Next, I will consider the most important establishment clause arguments against funding religious advocacy, and their applicability to political advocacy, followed by the countervailing arguments against restraint on political advocacy in a subsidized environment and their applicability to religious advocacy. Finally, I will analyze each of the prominent government mechanisms for resolving the problem. This analysis will indi-

---

5. Throughout this article, I will use the term "church" to mean a religious organization; it is not confined to an institution of the Christian church or any other religion.

6. Professor Kamenshine has, however, used the religious disestablishment concept as a basis for criticizing current doctrine on the general issue of government speech. *See* Kamenshine, *supra* note 1.

cate ways in which we should modify our current understanding of political and religious disestablishment.

I. Politics and Religion: The Constitutional Analogy

At first blush, the text of the Constitution appears to foreclose any argument that government support for political advocacy stands on the same footing as government support for religious expression. The first amendment forbids Congress from making any "law respecting the establishment of religion or prohibiting the free exercise thereof."[7] This conjoins what may be viewed as two separate concepts—the one forbidding government restraints on the practice of religion, the other forbidding at least some forms of government support for religion. By contrast, there is but one clause bearing on political speech: "Congress shall make no law . . . abridging the freedom of speech."[8] This prohibits restraints on, among other things, political expression. Conspicuously, there is no explicit political counterpart to the establishment clause, and thus no explicit prohibition of government support for a particular political viewpoint. Accordingly, it has been argued that the constitution does not limit the government's authority to assist and support the propagation of political opinions.[9]

But the Supreme Court has repeatedly found protection in the free speech clause for persons who wish not to be compelled to support political causes with which they disagree. The personal rights implicated in the flag salute cases, for example,[10] are strikingly similar to those in the school prayer cases.[11] In each, the question was whether a school child could be required (either overtly, as in *West Virginia State Board of Education v. Barnette*,[12] or through more subtle means of coercion, as in *School District v. Schempp*[13]) to recite officially prescribed statements with which he disagreed.[14] The lack of an establish-

7. U.S. Const. amend. I.

8. *Id.*

9. Lathrop v. Donohue, 367 U.S. 820, 852-53 (1961) (Harlan, J., concurring).

10. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

11. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

12. 319 U.S. 624 (1943).

13. 374 U.S. 203 (1963).

14. A significant difference between the flag salute and school prayer decisions is that in the former the reluctant students were permitted to opt out while in the latter

ment clause counterpart to the free speech clause was not dispositive: the right to speak was held to include the right not to speak.[15] Indeed, the Court announced a sweeping "establishment clause" for all "matters of opinion": "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[16] To "prescribe what shall be orthodox" is the essence of establishment.

Similarly, in *Abood v. Detroit Board of Education*,[17] the Court unanimously held that the state could not require an individual to pay dues to a private organization (a labor union) for use in political lobbying. This would seem closely akin to the basic establishment clause right not to be compelled to contribute to a church. Again, however, the free speech clause was not found wanting. The right to associate through contributions for the purpose of political advocacy was held to include the right not to do so. The Court invoked the famous words of Thomas Jefferson, originally written in the religious context: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[18]

The Court has also upheld legislative and executive measures denying significant forms of material support to private organizations that engage in political lobbying—e.g., eligibility of contributions for income tax deductibility and inclusion in the federal employee charity drive.[19] These decisions are consistent with *Barnette* and *Abood*. Even if not constitutionally compelled, the exclusions served the "countervailing First Amendment value"[20] of ensuring that the citizens, as taxpayers, are not

---

the prayers were terminated. *See infra* notes 145-47 and accompanying text.

15. This theme has been repeated in Pacific Gas & Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986); Harper & Row Publishers v. Nation Enter., 105 S. Ct. 2218 (1985); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

16. *Barnette*, 319 U.S. at 642.

17. 431 U.S. 209 (1977); *see also* Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986).

18. 431 U.S. at 235 n.31 (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)). The sweeping language of *Abood*, including the Jefferson quote, might seem to extend to taxpayer-funded political communications by government officials. *See supra* note 1 and accompanying text. Here, I will rely on *Abood* only in its less expansive sense of forbidding compelled contributions to the political speech of private organizations.

19. Regan v. Taxation with Representation, 461 U.S. 540 (1983); Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985).

20. Harper & Row Publishers v. Nation Enter., 105 S. Ct. 2218, 2230 (1985).

required to underwrite the political lobbying activities of private organizations.[21]

Barnette and *Abood* are correct in perceiving the free speech clause as containing a protection against compelled speech. The broader purposes of the first amendment as they relate to politics and religion are not so disharmonious as to warrant an interpretation under which the government has unlimited power to promote orthodox political thought. The free speech clause should be seen not as the political analogue to the free exercise clause only, but as the analogue to the two religion clauses in tandem. The free speech clause protects individual choice with reference to political expression: the right to speak and also the right to remain silent. The religion clauses are to similar effect, with reference to religious expression: the free exercise clause guarantees the right to practice the religion of one's choice and the establishment clause guarantees the right to refrain from practicing any other. The two religion clauses, under this understanding, are complementary, not contradictory. Both protect religious choice. Restraints on one faith and support for another tend toward the same end and are often indistinguishable. For much the same reason, the free speech clause should be seen as having both an "establishment" and a "free exercise" dimension.

The religion clauses and the first amendment's protection of political speech are also parallel in that both have an institutional as well as an individualistic purpose. It is commonly understood that the free speech clause has two principal purposes. First, it protects a significant aspect of human dignity, the autonomy of thought and communication. Second, it preserves the necessary social and intellectual conditions for democratic government by decentralizing and privatizing the fundamental business of molding public opinion.[22] These purposes correspond to the institutional and individualistic aspects of the religion clauses—the separation of church and state and the protection

---

21. *But see* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 n.13 (1980) (leaving open whether a state-sanctioned monopoly may pass on to ratepayers the cost of bill inserts that discuss "controversial issues of public policy").

22. *Compare* Cohen v. California, 403 U.S. 15, 24 (1971) ("individual dignity and choice") *with* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (free speech essential to intelligent democratic self-government). For a thorough investigation of the philosophical underpinnings of free speech, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982).

of individual religious conscience.[23] Full achievement of these purposes requires both an "establishment" and a "free exercise" dimension. Ours is neither a "one party" nor a "one church" state; our system depends upon and guarantees the right of citizens, individually and in association, to reach their own judgments about what is best in politics and well as in religion.

On two occasions,[24] the Court has found "patently inapplicable"[25] any analogy between government subsidies for churches and government subsidies for private political advocacy, offering somewhat different reasons. Since the conclusion in these two cases is at odds with this article, as well as with *Barnette* and *Abood*, which the Court did not cite or distinguish, the reasoning of the two cases warrants full consideration.

In *Buckley v. Valeo*,[26] the Court upheld grants of tax money to political parties for campaign purposes despite a free speech challenge based on an analogy to the establishment clause. The Court's explanation was that the "historical bases of the Religion and Speech Clauses are markedly different."[27] According to the Court, the former was intended to prevent "persecutions," while the latter was intended to assure "uninhibited, robust, and wide open" public debate.[28] Thus stated, the Court's argument has neither historical nor theoretical merit. As has been discussed, the free speech and religion clauses share the objectives of protecting individual dignity and preserving the marketplace of ideas.[29] The goal of preventing persecution of the expression of unpopular ideas (whether political or religious) has its roots

---

23. The separation of church and state is commonly perceived as being embodied in the establishment clause, *see, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947), but separation is also an important element under the free exercise clause, which safeguards the autonomy of religious institutions from intrusive government control, *see, e.g.*, Presbyterian Church v. Mary Eizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1960).

Protection for religious conscience is commonly perceived to be embodied in the free exercise clause, *see, e.g.*, Thomas v. Review Board, 450 U.S. 707 (1981), but if a person were required to worship in a different church than his own that would be a classic establishment clause violation. The closest actual Supreme Court case is Torcaso v. Watkins, 367 U.S. 488 (1961), which I believe should have been analyzed as an establishment case.

24. FCC v. League of Women Voters, 468 U.S. 364 (1984); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

25. *Buckley*, 424 U.S. at 92.

26. 424 U.S. 1 (1976) (per curiam).

27. *Id.* at 93 n.127.

28. *Id.*

29. *See supra* text accompanying notes 22-23.

in concepts of individual rights and dignity, but it necessarily also has the social consequence of assuring wide open debate on matters of common concern (whether political or religious).[30] Whatever reasons there may be for differential treatment of politics and religion under the first amendment, the distinction between preventing persecution and fostering open, robust debate is not among them. Both clauses promote both objectives.

It appears that underlying the Court's reference to "persecutions" is the notion, occasionally seen in Court opinions under the rubric of "political divisiveness," that aid to religion is uniquely likely to foment political discord and division.[31] As Justice Black put it, "[t]he First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people."[32] If this identifies a significant difference between politics and religion, it might well justify distinguishing between aid to religion and aid to political advocacy. There are, however, substantial objections to this approach.

First, while religion undoubtedly can be a divisive force, the same can be said for politics. These are questions of degree, and of historical judgment. Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery. Some religious groups are narrow, rigid, and militant. Others are ecumenical, flexible, and inoffensive. The same can be said of political groups. Constitutional policy should not be set according to inaccurate generalizations.

But even assuming that religious involvement in politics is particularly divisive, it is not true that the issue of aid to religion is especially so. Parochial school aid is a hotly contested issue in some areas, to be sure; but it is not clear that denying aid is less divisive than granting it.[33] More divisive yet are such

---

30. *See* McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("[R]eligious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open . . . .' ") (citation omitted).

31. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3240 (1985) (Powell, J., concurring); Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).

32. Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting); *cf.* Engel v. Vitale, 370 U.S. 421, 432 (1962) (Black, J., concurring) (It is "historical fact that governmentally established religions and religious persecutions go hand in hand.").

33. In Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985), the lower court

religious issues as abortion, sanctuary for illegal refugees, nuclear disarmament, and homosexual rights. Yet no one would suggest that religious voices on these issues should be silenced because of their potential for political divisiveness. Justice Brennan put it well:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion or . . . political participation in a status less preferred than rights of . . . political participation generally.[34]

When religious groups engage in political activity, they must be accorded the same rights as any other. Perhaps none should receive public financial support, but the evils of discord and disharmony provide inadequate justification for distinguishing between religious and political participation.

The Court's second attempt to explain why use of tax revenues for the propagation of private political opinions might (unlike aid to religion) be constitutional was in a footnote in *FCC v. League of Women Voters*:[35] "[V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object. Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." Surely, however, this proves too much. Merely because there are many infringements of "liberty" as to which a citizen may not object does not mean that he cannot object to an infringement of his rights of free speech.

---

found evidence of "political divisiveness" in the fact that the school board publicized its private school programs in an attempt to increase public support for its millage tax. Americans United for Separation of Church & State v. School Dist., 718 F.2d 1389, 1400-01 (6th Cir. 1983), *aff'd sub nom*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985). Surely it was just as much evidence of the opposite. Allowing parochial school children to share in some of the benefits of publicly funded education broadens support for the public schools and may thus reduce political division along religious lines.

34. McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (footnote and citations omitted).

35. 468 U.S. 364, 385 n.16 (1984) (dictum) (citation omitted). The constitutional analysis in the footnote is dictum because no party had argued that public subsidies for broadcasters were unconstitutional in absence of the ban on editorializing. The government merely contended that the ban on editorializing was "intended to prevent the use of taxpayer moneys to promote private views with which taxpayers may disagree"—an argument that the editorializing ban was permissible, not that it was mandated. *Id.*

There is no constitutional provision prohibiting Congress from making controversial expenditures—be they nuclear weapons or agricultural price supports—but this tells us nothing about whether the Constitution prohibits Congress from taxing some individuals to finance propagation of political or religious opinions.

Moreover, it seems clear that the Court would not follow its logic if subsidies to private political advocacy were distributed so as to favor some viewpoints over others. If pro-nuclear but not anti-nuclear editorials were subsidized, one can be confident the scheme would be struck down—notwithstanding the fact that non-speech expenditures systematically favor defense over disarmament. This is because government expenditure for the propagation of opinions by private persons and groups stands on a different constitutional footing than other government expenditures to which some may object. The reasoning in *League of Women Voters* falls short of justifying the contrary conclusion.

The current status of political and religious disestablishment doctrine can best be seen by comparing two cases, *Abood v. Detroit Board of Education*[36] and *Lemon v. Kurtzman.*[37] At issue in *Lemon* was a system of payments by the state to private schools, including religious schools, to defray the actual cost of salaries and materials used in teaching certain specified secular courses. The *Lemon* court was faced with three possible approaches to interpreting the religion clauses as they applied to government grants to private schools. First, it could have upheld aid to religious schools without serious evaluation of whether tax funds were used for religious training. Second, it could have forbidden all aid to religious educational institutions without regard to its use. Third—the approach actually taken—it could have permitted aid only to the secular aspects of the parochial school program.

The two approaches rejected by the Court have their attractions. The Court could have reasoned that once the government decides to pay for education, it should be neutral regarding the educational choices of parents. There is no more reason for the government to promote secular education over religious education than religious education over secular education. Parents should be free to choose. The taxpayer's interest is fully satisfied

36. 431 U.S. 209 (1977).

37. 403 U.S. 602 (1971).

if secular educational standards are met. This would accord with an interpretation of the religion clauses under which the dominant principle is individual choice. Under this view, the parochial school subsidies in *Lemon* would be constitutional and even desirable, because they move in the direction of government neutrality, diversity of educational offerings, and individual choice.

On the other hand, the Court could have reasoned that any government subsidy of a religious activity is prohibited by the Constitution. Parochial schools are undeniably part of the religious mission of their sponsoring churches. Therefore, the government may no more give money or aid to religious schools than to churches themselves. This would accord with an interpretation of the establishment clause under which the dominant principle is that there is a high and impregnable wall of separation between church and state, 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 . . . ."[38] Under this view, the program in *Lemon* would clearly be unconstitutional.

Either of these approaches might also be applied in the context of political advocacy. One might reasonably argue that once the government decides to pursue social objectives through private grantees, it should disregard the political activities of potential grantees. To refuse funding for their nonpolitical activities on account of their political activities would be to penalize them for a constitutionally protected activity. On the other hand, one might argue that government services must be delivered in a politically neutral manner, that to allow politically active organizations to administer public programs is an unwarranted benefit to them, that awarding financially beneficial grants to such organizations necessarily gives the appearance—if not the substance—of partiality and favoritism.

In any event, the Court in *Lemon* eschewed these stark alternatives and adopted what might be characterized as a middle ground. It accepted *in principle* the notion that government may subsidize the secular aspects of private school education. But it imposed two limitations: (1) the government must not allow the aid to be used for religious training or indoctrination (this the Court called the "primary effect" of "advancing religion"), and (2) the government must not "entangle" itself with

38. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

religious institutions by overseeing parochial school teachers to ensure that the former requirement is faithfully observed.

The underlying principle of *Abood* is strikingly similar to *Lemon*. As in *Lemon*, the *Abood* Court rejected alternatives that would have permitted no compulsory support for union activities, on one hand, and that would have permitted compulsory support for all such activities, including political lobbying and advocacy, on the other. As in *Lemon*, the Court sought to distinguish between activities which the government could legitimately support and those which must, under the first amendment, remain wholly voluntary.

The Court's analyses in *Abood* and *Lemon*, however, differ in three important respects. First, in *Abood*, the Court sensed no constitutional compunction against closely analyzing the political character of the union's activities. This became even clearer in the subsequent decision of *Ellis v. Brotherhood of Railway Clerks*,[39] in which the Court scrutinized each of the union's activities to determine whether it was related to the union's non-ideological duties as bargaining agent or, rather, constituted political advocacy. By contrast, in *Lemon* and its progeny, the court has treated the very attempt to distinguish between the "secular" and the "religious" activities of parochial schools as unwarranted "entanglement" between church and state. The consequence has been to permit only inherently secular—or "self-policing"—forms of assistance, like bus transportation and textbooks. If a proposed form of assistance requires close judgments about the boundary between "religious" and "secular," the assistance is forbidden.

Second, in *Abood*, the Court acknowledged that certain aspects of the union's fundamental collective bargaining activities would necessarily have a political component. In such instances, where political advocacy cannot be segregated from collective bargaining, the Court has permitted the use of compulsory dues. By contrast, in the parochial school cases the Court has forbidden the use of tax money for aspects of the school program in which religious training cannot be separated from secular education. Indeed, most classroom instruction (at least in what the Court terms "pervasively sectarian" institutions) falls into this mixed category.

Third, the remedy in *Abood*, as clarified in *Ellis*, was to al-

39. 466 U.S. 435 (1984).

low dissenters to opt out of the program. This means that the dues of unwilling nonparticipants must be reduced, pro rata, to the extent that expenditures are made for political advocacy. The remedy in *Lemon*, however, was to forbid the use of any funds generated by government compulsion for religious training or indoctrination. Thus, the tax dollars of the willing and the indifferent, as well as the unwilling, are off limits to the religious programs of parochial schools.

Each of these differences raises an important question of constitutional policy, and will be considered in detail below.[40] Thus, I do not insist that politics and religion must in every respect be treated identically under the first amendment. In subsequent sections I will discuss the subsidiary values of disestablishment under the first amendment and how the political or religious nature of the expression may affect those values.[41] However, a fruitful analogy between political and religious disestablishment is possible, given the Court's decisions and the text and purposes of the first amendment.

However, at the outset we must recognize one important respect in which "politics" and "religion" are asymmetrical. Religion, unlike politics, is commonly understood not merely as a subject but also as a point of view.[42] The term "religion" can denote a specific subject matter open to many points of view; this is sometimes called "theology." More often, however, "religion" denotes an outlook toward many different subjects, under which an important element in understanding the phenomena of the world is the presence of a transcendent being. "Politics" lacks this latter connotation, except at a high level of abstraction. "Politics" is simply the subject matter of social organization as related to government.[43] Thus, the opposite of "religion" can be said to be "secularism" or "nonreligion"—or perhaps "irreligion."[44] "Politics" has no opposite in this sense. To favor religion over nonreligion—or nonreligion over religion—is to take

---

40. *See infra* text accompanying notes 110-31 and 138-47.

41. *See infra* text accompanying notes 88-116.

42. On the distinction between viewpoint-based restrictions and subject matter restrictions, see Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239-242 (1983).

43. I use the term "politics" in its ordinary modern sense. Even the "anti-political" view—the systematic preference of private over public ordering—is a "political" view in this sense.

44. *See* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 813 (1978).

sides. To take sides in the political arena, one must favor one political view over another; evenhanded support or discouragement of "politics" in general is not viewpoint discrimination.

This asymmetry has two important legal implications. First, it makes government aid to religion in general—i.e., "nonpreferential" aid to all religions—suspect unless the aid reaches a broader category of institutions or activities, encompassing the nonreligious as well as the religious, or unless the distinction serves a legitimate state purpose such as protection of free exercise values. Otherwise, to target aid to the religious is not simply to encourage discussion of a subject, but to promote the point of view that the transcendent or divine is important. Thus, for example, property tax exemptions for churches are legitimate if also extended to a broad range of other non-profit organizations;[45] an exemption for churches alone would be difficult to defend. Targeting aid to political activity in general presents no such problem. The government can encourage discussion of politics without favoring one point of view over another.

Second, this asymmetry makes exclusion of religious institutions or individuals from otherwise broad-based government benefits more problematical. While a viewpoint-neutral ban on political activity is subject to less exacting constitutional scrutiny,[46] an exclusion of religion is inevitably viewpoint-based and hence should be subject to the most exacting scrutiny.[47] It is difficult to imagine a program of widespread government benefits from which religion could be excluded simply on the ground of being religious.

The decisions of the Court, as well as considerations of sound constitutional doctrine, thus establish that government has at the very least a legitimate purpose (and in some cases a constitutional obligation) to prevent compulsory support for political as well as religious advocacy. The Court has taken note of

---

45. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

46. *See* Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985); Regan v. Taxation with Representation, 461 U.S. 540 (1983); Greer v. Spock, 424 U.S. 828 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). *But see* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). Professor Stone has explained the lower standard of review as follows: "[S]ubject-matter restrictions are directed, not at particular viewpoints, or items of information, but at entire subjects of expression. They are thus less likely than viewpoint-based restrictions to distort public debate in a viewpoint-differential manner, to implicate constitutionally disfavored justifications, or to be the product of improper motivation." Stone, *supra* note 42, at 241.

47. *See* Widmar v. Vincent, 454 U.S. 263 (1982).

the federal government's "sharply defined policy" that "political agitation . . . must be conducted without public subvention"—that with reference to political lobbying and publicity, "everyone in the community should stand on the same footing . . . so far as the Treasury of the United States is concerned."[48] Full vindication of this constitutional value is, in significant part, entrusted to the elected branches. And while neither consistent nor unproblematic in their details, the actions of the elected branches have been, to a surprising extent, faithful to this understanding of the constitutional values at stake.

II. Current Restrictions on the Use of Government Resources for Private Political and Religious Advocacy

Each of the three branches of government has pursued the constitutional value of avoiding compulsory support for political and religious advocacy in its own way, but no consistent pattern has emerged. In some areas—aid to private education, for example—there are comprehensive, constitutionally-mandated restrictions against use of public funds for religious indoctrination, and essentially no formal restrictions on political indoctrination. By contrast, in other areas—such as the income tax deductibility of charitable contributions—religious uses are unfettered and political uses closely circumscribed. In still other areas—for example, government grants to private organizations—both forms of subsidized advocacy are prohibited, though in different ways. Before considering which methods of regulating private advocacy at public expense serve which aspects of the underlying constitutional value, it will be useful to describe and analyze the relevant policies now in force.

A. Public Subsidy of Private Organizations for a Public Purpose

There are more than 350 separate federal statutory programs (not necessarily funded in any given fiscal year) which provide funds to private, usually non-profit, organizations through grants, contracts, and cooperative agreements.[49] For convenience, I will call all such instruments "grants" and the in-

48. Cammarano v. United States, 358 U.S. 498, 512-13 (1959) (citation omitted); *see also* Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 854 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

49. These terms are defined in 31 U.S.C. §§ 6302-03 (1982).

stitutional recipients "grantees"; individuals benefiting from the programs I will call "beneficiaries." The grants may take the form of periodic subsidies to the grantee itself or payment-for-services arrangements under which the government reimburses the cost of providing social services to designated beneficiaries. These federal government grants to private, non-profit organizations are estimated to exceed $40 billion annually.[50] Many—perhaps even most—of the participating organizations also engage in substantial religious or political activities (even if only to lobby for increased funding for their own grant program). Though parochial school aid has received most of the attention, there are extensive social welfare activities conducted by religious organizations with government grants. Among them are hospitals, soup kitchens, drug abuse programs, orphanages, emergency shelters, nursing homes, family planning services, higher education, housing, job training, economic development, refugee resettlement, Head Start, tutoring, mental health programs, arts and humanities projects, school lunches, and foreign disaster relief.[51] Indeed, of over 350 federal statutory provisions for grants to private organizations, I have discussed none from which religious organizations are excluded.

Using private grantees to deliver public services serves some important governmental interests. Private organizations frequently deliver the desired services more effectively or efficiently. When the government establishes a new program, private organizations with their expertise and contacts will frequently be operating in the field already. Their position of credibility and trust among the target population may be invaluable to the program. Moreover, private organizations can frequently use the same overhead, and rely on lower-paid or volunteer help by persons more committed than the average government worker. Grants to private organizations also lead to greater diversity in the way services are delivered, and thus may reach a broader spectrum of the eligible population. Thus, gov-

---

50. The federal government does not maintain systematic data on aid to nonprofit organizations. The best estimate is by the Urban Institute, which states that federal financial support to nonprofit organizations, excluding religious organizations, in fiscal year 1981 was $46.1 billion—or about 38% of their revenues. URBAN INSTITUTE, THE REAGAN EXPERIMENT 232 (1982).

51. *See generally* B. COUGHLIN, CHURCH AND STATE IN PUBLIC WELFARE (1965); Pickrell & Horwich, *Religion as an Engine of Civil Policy: A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 LAW & CONTEMP. PROB. 111 (1981).

ernment may often better deploy its resources by expanding these pre-existing private activities rather than by creating a new bureaucratic superstructure.

While the government has much to gain from using private organizations to administer social programs, it sacrifices part of its ability to control the uses of its resources.[52] Private grantees will frequently have their own agenda. The question therefore necessarily arises how to ensure that government grant moneys are not spent for the organization's own political or religious purposes, instead of the purposes of the grant.

The Supreme Court's approach to this problem has been to treat grants for primary and secondary education under an exacting constitutional standard, and grants for all other purposes under a much more relaxed standard. Direct grants to religiously-oriented primary and secondary schools are effectively precluded by the combination of the "effects" and "entanglement" parts of the *Lemon* test, summarized above.[53] By contrast, religious institutions can receive direct cash grants for other social welfare purposes, on the sole condition that they agree not to use the aid for religious purposes.[54]

The legal justification for this bifurcated approach is not strong. Two rationales are sometimes offered. The first is that parochial schools are "pervasively sectarian" in a way that other institutions are not.[55] This may sometimes be true, but it is not necessarily so. Some inner-city Roman Catholic schools are quite nonsectarian, and some religious social welfare programs are suffused with religion. Yet the Court has never held any religiously-affiliated primary or secondary school not "pervasively sectarian" (sometimes despite quite persuasive evidence); and it has never held any religiously-affiliated organization of any other description "pervasively sectarian." It is difficult to take this rationale seriously.

The second argument for treating parochial school aid with more exacting scrutiny rests on the assumption that education involves religious indoctrination but other social welfare func-

---

52. *See* Salamon, *Rethinking Public Management: Third Party Government and the Changing Forms of Government Action*, 29 Pub. Policy 255, 257-61 (1981).

53. *See supra* text accompanying notes 38-39.

54. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (higher education); Lemon v. Kurtzman, 403 U.S. 602, 633 (1971) (Douglas, J., concurring) (social welfare programs); Bradfield v. Roberts, 175 U.S. 291 (1899) (hospitals).

55. *See* Tilton v. Richardson, 403 U.S. 672, 680-682 (1971).

tions do not.[56] However, many, if not most, churches understand their ministry to physical needs as integrally related to their mission of spreading the gospel. Who can doubt that the Salvation Army puts a message into each cup of coffee? Indeed, to the extent that parochial schools are selected predominantly by persons who are already members of the schools' religious group, while most social welfare programs are targeted to the public at large, proselytizing is more likely in the latter than the former. This suggests that the Court's approach is precisely backwards.

Whether or not justifiable, the differential constitutional standard for primary and secondary education on the one hand, and all other social welfare functions, on the other, is now deeply ingrained. Indeed, remarkably few lawsuits outside the education field challenge grants to religious institutions. The main operative constraint on religious advocacy under federally-funded social welfare programs, therefore, is statutory. Most such statutes provide that the appropriated government funds may not be used for religious purposes. Grant programs for college and research libraries[57] are typical. These programs are subject to the following restrictions: "No grant may be made under this subchapter for books, periodicals, documents, or other related materials to be used for sectarian instruction or religious worship, or primarily in connection with any part of the program of a school or department of divinity."[58] These statutory restrictions are enforced by administrative audit standards, which seek to ensure that federal funds are used only for statutory purposes.

Similarly, a variety of statutory restrictions apply to the use of federal funds to promote political advocacy. The following provision applies to all federal agencies: "No part of any appro-

---

56. *See Lemon*, 403 U.S. at 633 (Douglas, J. concurring).

57. 20 U.S.C. §§ 1021-47 (1982).

58. 20 U.S.C. § 1021(c) (1982). To similar effect, see, e.g., 7 U.S.C. § 1047(f) (1982) (international agricultural development); 20 U.S.C. §§ 122, 123 (1982) (Howard University); 20 U.S.C. § 241(a)(4) (1982) (disaster relief for private schools); 20 U.S.C. § 1119b-3(c) (1982) (fellowships for special education teachers); 20 U.S.C. § 1132e(c) (1982) (higher education); 20 U.S.C. § 1210 (1982) (adult basic education); 20 U.S.C. §§ 3231(b)(3)(C)(ii), 3384 (1982) (bilingual education, open to private school children); 20 U.S.C. § 3862 (1982) (education block grant); 25 U.S.C. § 1803(b) (1982) (community colleges controlled by Indian tribes); 29 U.S.C. § 776(g) (1982) (rehabilitation facilities for the handicapped); 42 U.S.C. § 293(c) (1982) (primary care teaching facilities); 42 U.S.C. §§ 296a, 296c (1982) (nursing training); 42 U.S.C. § 3027(a)(14)(A) (1982) (multipurpose senior centers); 42 U.S.C. § 3056(b) (1982) (community service employment for older persons); 42 U.S.C. § 5001(a) (1982) (retired senior volunteer programs).

priation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation before Congress."[59] Several programs have more detailed or stringent restrictions, largely because of problems with lobbying in the past.[60] These statutory provisions, in turn, are supplemented and enforced by administrative standards promulgated by the Office of Management and Budget and applied to individual grants through agency regulation.[61] Although much more detailed, the basic approach of these standards is similar to the restrictions on religious uses: they require an accounting separation between permissible grant activities and impermissible lobbying, and deny government reimbursement for the cost of the latter.

B. Indirect Aid Through Assistance to Beneficiaries

A second important category of government social programs administered by private organizations consists of grants made by the government directly to eligible individuals, which they use to procure specified services from a private organization. For convenience, I will use the term "indirect aid" to distinguish this form of assistance from the "direct grants" already discussed. Student grants and loans are the paradigm of "indirect aid."[62] Such programs are of substantial benefit to the institutions involved, and in some senses are indistinguishable from direct grants to the institutions.

Despite the similarities, indirect aid programs are sharply

---

59. This provision is enacted each year as part of the Treasury, Postal Service, and General Government Appropriations Act. *See, e.g.*, Pub. L. No. 96-74, § 607(a), 93 Stat. 559, 575 (1979).

60. *See, e.g.*, 42 U.S.C. §§ 2996e(c) & 2996f(a)(6) (1982) (Legal Services Corp.); 31 U.S.C. § 6715 (1982) (revenue sharing).

61. *See* 5 C.F.R. pt. 1300 (1986).

62. The term "indirect" is used in several different ways, and I am forced to add to the confusion. In this section, I use "indirect aid" to distinguish between aid provided to an institution and aid received by an institution through its beneficiaries. In sections III and V, I use the term "indirect subsidy" to denote aid to nonreligious (or nonpolitical) activities of an organization that indirectly benefits the organization's religious (or political) activities. The Court uses the term "indirect" both ways, sometimes even within a single paragraph. *See* Grove City College v. Bell, 465 U.S. 555, 564 (1984); In Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3228 (1985) the Court used the term " 'indirect' aid" to denote loans of textbooks and the provision of transportation to students, and the term "direct aid" to denote loans of instructional materials to students or provision of tuition tax deductions to students. This obviously makes no sense at all.

differentiated in practice and constitutional doctrine from direct grant programs. Federal law characterizes indirect aid as assistance to individual beneficiaries; it is not considered a grant, contract, or cooperative agreement for purposes of federal audits or cross-cutting requirements. The individual beneficiary may use the aid in any qualified institution, and there are no restrictions based on the religious or political affiliations of such institutions. For example, students may use veterans' benefits, Pell Grants, and other educational grants and loans at any accredited institution of higher learning, including religious schools and even seminaries.[63] The federal government does not audit the use of the funds, other than to ensure that the individual beneficiary is eligible and that the funds are properly paid to the accredited institution. The institution is free to use the funds for religious training or political lobbying, if it so chooses.

The Supreme Court has made the same distinction between direct grants to institutions and "indirect aid" provided through individual beneficiaries.[64] In recent decisions, the Court has pointed out that with only one exception, every direct cash subsidy from the government to elementary or secondary religious schools has been held unconstitutional,[65] and that—also with but one exception—every school aid program held unconstitutional was one "involv[ing] the direct transmission of assistance from the state to the schools themselves."[66] In other words, direct cash grants to elementary or secondary religious schools are virtually always unconstitutional, while assistance to beneficiaries (so long as it does not favor religious over nonreligious

63. *See* Brief for the United States as Amicus Curiae at 2-4, Witters v. Washington Dep't of Serv. for the Blind, 106 S. Ct. 748 (1986) (No. 84-1070).

64. *Witters*, 106 S. Ct. at 748; Mueller v. Allen, 463 U.S. 388 (1983); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 782 n.38 (1973); Americans United for the Separation of Church & State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd summarily*, 434 U.S. 803 (1977); Smith v. Board of Governors, 429 F. Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977); *see also* Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

65. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3228 (1985). The exception was Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

66. Mueller v. Allen, 463 U.S. 388, 399 (1983). The exception was Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). In Witters v. Washington Dep't of Serv. for the Blind, 106 S. Ct. 748 (1986), the Court stated that "[a]id may have th[e] effect [of a direct subsidy to a religious institution] even though it takes the form of aid to students or parents." *Id.* at 752. However, the actual holding of *Witters* is consistent with the analysis in text, and five Justices concurred on broader grounds than the majority opinion.

institutions[67]) is generally permissible. Thus, indirect aid may go to "pervasively sectarian" institutions and may be used for any purposes, including core religious teaching.[68]

Institutions benefiting from indirect aid programs are subject to federal regulation only under four civil rights laws—Title VI of the Civil Rights Act of 1964,[69] Title IX of the Education Act Amendments of 1972,[70] the Age Discrimination Act,[71] and section 504 of the Rehabilitation Act of 1973.[72] The validity of the Supreme Court's conclusion that aid to individuals constitutes federal financial assistance to the institution within the meaning of these civil rights laws[73] is beyond the scope of this article. It is, however, best viewed as an exception generated by the peculiar political and legal dynamics of civil rights enforcement and reflected in quite specific legislative history,[74] rather than as an indication that indirect aid is indistinguishable in legal theory from direct grants to the institutions involved.[75]

C. Tax Benefits

Tax benefits are perhaps the most important form of financial assistance to nonprofit organizations, including organizations engaged in religious and political advocacy. Tax benefits at the federal level include exemption from income, estate, gift, unemployment, and social security taxes, and eligibility for charitable contribution deductions. The Treasury estimated the value of the latter benefit to all eligible charitable organizations as $9.16 billion in fiscal year 1984.[76]

Tax-exempt status depends on several subsections of section 501(c) of the Internal Revenue Code. Section 501(c)(3) exempts from taxation all nonprofit organizations operated exclusively for religious, charitable, educational and like purposes,

---

67. *See* Sloan v. Lemon, 413 U.S. 825 (1973).

68. *See Witters*, 106 S. Ct. at 748; Mueller v. Allen, 463 U.S. 388 (1983); *cf.* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

69. 42 U.S.C. § 2000d (1982).

70. 20 U.S.C. §§ 1681-1686 (1982).

71. 42 U.S.C. §§ 6101-6107 (1982).

72. 29 U.S.C. § 794 (1982).

73. *See* Grove City College v. Bell, 465 U.S. 555 (1984).

74. *See id.* at 565-68

75. For a comparison and analysis of the principles of coverage under the establishment clause and the four civil rights statutes, see Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61.

76. OFFICE OF MANAGEMENT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SPECIAL ANALYSES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1984 6-27 (1984).

and allows for income tax deductions for all contributions made to such institutions.[77] On the other hand, section 501(c)(4) exempts from taxation all nonprofit organizations operated exclusively for the "promotion of social welfare," but it does not allow deductions for contributions made to such institutions.[78] The crucial difference is that 501(c)(3) organizations may not engage in substantial lobbying. A 501(c)(3) organization can, however, create a tax-exempt lobbying affiliate under section 501(c)(4). The practical effect is that the organization's non-political charitable activities will be eligible for tax-deductible contributions; but the lobbying arm of the organization, while tax exempt, must be funded by means other than tax-deductible contributions.

The most noteworthy feature of the tax system for present purposes is the congressional extension of the "subsidy" inherent in tax deductibility of contributions to religious organizations, but not to organizations substantially engaged in political lobbying.[79] This is seemingly at odds with the conventional view that subsidy of religious activity is constitutionally more problematic than subsidy of political advocacy. Nonetheless, the Court has held (and I think correctly) that Congress may choose to exclude political lobbying groups from tax benefits, and may also choose to include religious groups.

The exclusion of political lobbying groups from section 501(c)(3) was upheld against free speech clause challenge in *Regan v. Taxation with Representation*,[80] on the theory that although political lobbying is a protected constitutional right, the government is not required to subsidize it.[81] An important quali-

---

77. Eligibility for tax deductible contributions is determined under § 170(a)(1) and (c)(2) of the Internal Revenue Code, Title 26 of the United States Code, which in turn cross-references § 501(c)(3).

78. The exemption from income tax, in either case, does not extend to "unrelated business income"—i.e., income generated from businesses unrelated to the organization's charitable activities.

79. The lobbying restrictions of section 501(c)(3) apply to religious as well as other nonprofit organizations. (At their request, churches were not made subject to the more specific lobbying rules of section 501(h)). Thus, if a church were to engage in substantial lobbying, it could lose its 501(c)(3) status. I will not here consider the free exercise clause arguments against applying the lobbying restrictions to religious organizations.

80. 461 U.S. 540 (1983).

81. This is a common theme in constitutional decisions. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* Harris v. McRae, 448 U.S. 297 (1980) *and* Maher v. Roe, 432 U.S. 484 (1977); *compare* Pierce v. Society of Sisters, 268 U.S. 510 (1925), *with* Lemon v. Kurtzman, 403 U.S. 602 (1971). *See generally* Currie, *Positive and Negative Rights*, U. CHI. L. REV. 864 (1986). This would have been a sounder basis for the decision in Corne-

fication to this holding, however, is found in the opinion of the concurring Justices.[82] According to the concurrence, section 503(c)(3)'s exclusion of charitable organizations that engage in substantial political lobbying is constitutional only because it is practicable to segregate lobbying activities from the other charitable activities and conduct those lobbying activities in a 501(c)(4) affiliate. If this were not possible, the concurring Justices would have held the political lobbying restriction unconstitutional.

The constitutionality of tax benefits for religious organizations, though once seriously challenged in the academic literature, today appears well-established. The "no-aid" interpretation of the establishment clause, on which the challenges rested, has been unequivocally rejected by the Court.[83] Although federal tax issues have not reached the Court,[84] it upheld the constitutionality of state property tax exemptions for religious institutions in *Walz v. Tax Commission*.[85] The essential constitutional feature of a valid system of tax benefits is that it be available to a wide array of beneficiaries and not targeted to religious groups or purposes.[86]

Indeed it is doubtful that an exclusion of only religious groups from tax-exempt status would be constitutional. In light of the viewpoint-based character of distinctions between religious and nonreligious groups, the government should not be permitted, absent compelling justification, to give tax benefits to nonreligious but not religious groups. To do so would be to prefer one point of view (the secular, nonreligious, or even antireligious) over another (the religious). This is no more defensible

---

lius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985) (political advocacy groups excluded from Combined Federal Campaign, which constitutes a major subsidy to the fundraising efforts of participating organizations).

82. Regan v. Taxation with Representation, 461 U.S. 540, 552-54 (1983). A majority of the Court relied on this concurrence in the subsequent decision of FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984).

83. Mueller v. Allen, 463 U.S. 388, 393 (1983); McDaniel v. Paty, 435 U.S. 618, 638 (1978) (Brennan, J., concurring).

84. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 790 n.49 (1973).

85. 397 U.S. 664 (1970).

86. It is possible to justify exemptions from taxation on the broader ground that they are not financial assistance at all, but merely a decision not to require the tax-exempt organization to support the government. *Walz*, 397 U.S. at 675; *see also* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972). My point here is that even assuming that tax exemptions are a form of "subsidy," there are no constitutional barriers to granting exemptions to religious organizations or to denying them to political organizations.

than the converse. If the government chooses to support a wide range of nonprofit organizations, it must include religious organizations among them.

Thus, three different patterns have emerged in the three major forms of financial assistance to private organizations. Direct grants to religious elementary and secondary schools are virtually prohibited, while direct grants to political and other religious social welfare activities are subject only to the limitation that public funds not be used, in an accounting sense, for religious or political purposes. Indirect grants—that is, aid to individual beneficiaries which also benefits private organizations—can be used by religious or political advocacy organizations, subject only to the requirement that the grants be evenhanded. And tax benefits can be given to both religious and political advocacy organizations; but, Congress has denied to political advocacy organizations the privilege of being able to use tax deductible contributions for lobbying. Outside the area of aid to religious elementary and secondary schools, the courts have tended to allow the other branches to determine the extent to which religious and political organizations should participate in government programs, and under what rules.

III. Subsidiary Objectives of Disestablishment

I have treated the constitutional interest in avoiding compelled support for political or religious views by private organizations thus far as a single objective. It may, however, conveniently be understood as comprising certain more specific, distinct concerns. There are five major reasons for excluding religious organizations from public benefits. The question in this section is the extent to which these concerns apply to political advocacy.[87]

---

87. I will not discuss an additional rationale sometimes found in the Court's decisions (though never made an independent ground for decision): that inclusion of religious organizations in public programs would cause political division along religious lines. *See, e.g., Lemon*, 403 U.S. at 622-24. This "political entanglement" theory is plainly untenable; it amounts to a one-sided, viewpoint-based restriction on public debate and democratic participation. *Cf.* McDaniel v. Paty, 435 U.S. 618 (1978) (holding unconstitutional the exclusion of ministers from public office). *See also* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1393 (1981). The Court has gently backed away from the political divisiveness argument in recent years. *See* Lynch v. Donnelly,

A. Avoiding Symbolic Effects

In *Grand Rapids School District v. Ball*,[88] the Supreme Court held that the "symbolic union of government and religion in one sectarian enterprise" is in itself an "impermissible effect under the Establishment Clause."[89] Notably, the "sectarian enterprise" to which the Court referred was the provision of otherwise unavailable remedial and enrichment courses in English, math, art, and music to children who attend private, religious schools—an enterprise which the Court had expressly found[90] a "manifestly secular" purpose. The obvious implication is that joint efforts by government and religious organizations, even to achieve a secular objective, are inherently suspect because of their symbolic effect. But this surely goes too far: the *Grand Rapids* Court simultaneously reaffirmed earlier precedents holding that the state could provide remedial education to religious school children, at public expense, if the teaching took place away from the sectarian school.[91] And the Court has not struck down any of the numerous social programs in which government and religious organizations cooperate—not to mention the many ceremonial acknowledgments of religion which surely create a stronger "symbolic union" than did the secular classes in *Grand Rapids*.[92] Some symbolic unions apparently are permitted even if others are not.

The *Grand Rapids* "symbolic union" argument is not a particularly helpful construct. Judgments about the weight of symbolic injuries are irremediably subjective, and therefore unpredictable. The "symbolic union" in *Grand Rapids* seems more an additional rhetorical support for the result than an analytical device for distinguishing legitimate from illegitimate programs

---

465 U.S. 668, 684-85 (1984); Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). *But see* Aguilar v. Felton, 105 S. Ct. 3232, 3240-41 (1985) (Powell, J., concurring).

88. 105 S. Ct 3216 (1985).

89. *Id.* at 3227. The Court relied, in part, on Justice O'Connor's suggestion in *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring), that the question under the establishment clause is whether a challenged practice either intends to or has the effect of conveying a message of approval or disapproval of religion. The analysis in text applies equally to this formulation.

90. *Grand Rapids* 105 S. Ct. at 3223.

91. *See id.* at 3227 n.10 (citing Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977)).

92. *See Lynch*, 465 U.S. at 674-68l; Marsh v. Chambers, 463 U.S. 783, 786-90 (1983); McGowan v. Maryland, 366 U.S. 420, 431-35 (1961); Zorach v. Clauson, 343 U.S. 306, 312-13 (1952).

of government assistance to churches' secular activities. It should be given little weight; it certainly should not be permitted to outweigh services, non-symbolic interests on the other side of the equation. Perhaps symbolic effects should be viewed not as an independent index of unconstitutionality but as an additional reason for forbidding actual, more-than-symbolic, establishments.

The question here, however, is not whether the "symbolic union" argument has merit in the abstract, but whether and to what extent it might apply to government assistance to political organizations. Any answer to this question depends on individual sensibilities; this is part of the problem with the "test." To this observer, however, the danger of symbolic union between government and private ideological advocacy seems somewhat less than the danger in the religious context. This is largely because government officials in a democracy are continuously engaged not just in governing but also in persuading. Their governmental and political roles are difficult to separate. It therefore seems inevitable that the organs of government will take sides with some citizens and against others in the battle of political ideas. The same cannot be said of religion.

In one powerful sense, however, we have a right to expect that government agencies and officials whose functions are removed from electoral politics will perform their functions in a professionally nonpartisan manner. Thus, civil servants below the ranks of the political appointees are required by law to refrain from partisan political activity, and public school teachers are—or at least ought to be—no less reluctant to indoctrinate their charges with their political opinions than with religious principles.[93] Private organizations performing public functions at public expense have similar professional obligations. Whatever may be their political agenda in their role as independent, privately-funded associations, government grantees and service providers should perform their public, government-funded functions in as neutral and non-ideological a manner as possible. They should not be permitted to use their grantee sta-

93. It is suggestive that the constitutional prohibition in religious tests for office (U.S. CONST. art. IV) has been extended, on free speech grounds, to prohibit political tests for office for nonpolicymaking officials. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (treating the two constitutional prohibitions as manifestations of the same principle).

tus to endow their own views with an aura of government endorsement or support. While these concerns do not take the form of constitutional prohibitions—like the dangers of symbolic church-state union—they provide an additional reason for vigilance in detecting more-than-symbolic, unconstitutional assistance to political advocacy and for legislative protections exceeding the constitutional minima.

B. Equality Among Religious Groups

The least controversial command of the establishment clause is that government not prefer one religious view over another.[94] One problem with allowing religious groups to participate in government-funded programs is the vast enlargement of possibilities for government preferences.

This might be the result of conscious government policy; more likely, it would be the result of unconscious assumptions about various religions. For example, if a government agency has the discretion to choose grantees to administer a housing program for the poor, it might well select organizations with a reputation for being responsible, open-minded, and nonsectarian. This could have the effect of preferring established, mainstream religious organizations over newer, more fervent, less "respectable" sects. This is a powerful reason for preferring decentralized or "indirect" aid programs, under which official decisions will not determine benefits to the various churches. Where the benefit to religious organizations comes about "only as a result of numerous, private choices of individual[s],"[95] government biases or preferences have less opportunity to play a part.

Nonetheless, even in the absence of governmental discretion to choose one grantee over another, the existence of government support is likely to benefit some religions more than others because government programs coincide more closely with the religious mission of some churches than of others. Aid to education, for example, benefits the Roman Catholic Church far more than most mainstream Protestant churches simply because the Catholic Church has considered it important to create a system of

---

94. Larson v. Valente, 456 U.S. 228, 244-45 (1982); *see also* Wallace v. Jaffree, 105 S. Ct. 2479, 2512-13, 2520 (Rehnquist, J., dissenting).

95. Mueller v. Allen, 463 U.S. 388, 399 (1984) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)); *accord* Witters v. Washington Dep't of Serv. for the Blind, 106 S. Ct. 748, 752 (1986).

parochial schools while most mainstream Protestant churches have not. This latter form of preference for one religious view over another is essentially the consequence of unequal propensities to take advantage of the benefit rather than of unequal opportunities. It is, therefore, less troublesome than the former preference, which results from governmental stereotypes and biases. Nonetheless, both forms have been treated as reasons for excluding religious participants from grant programs.[96]

The problem with allowing political advocacy groups to participate in government programs is precisely parallel to the problem in the religious context, and in some ways more severe. As with the establishment clause prohibition on preferring one religion over another, the doctrine of viewpoint-based restrictions under the first amendment prevents the government from "giv[ing] one side of a debatable public question an advantage in expressing its views to the people."[97] Yet when government agencies have the discretion to select grantees, they may prefer those which support the agency's (or the Administration's) goals. Who will receive an Energy Department grant for studying the effects of nuclear power—an organization sympathetic to nuclear power or an anti-nuclear group? Here, the problem is much more serious than in the religious context, because the ideological and political differences between potential grantees are far more likely to make a difference to government decision makers than are the grantee's religious differences.

As in the case of religious grantees, even programs in which the government maintains little discretion in choosing grantees will benefit some viewpoints more than others. Organizations with beliefs and objectives parallel to government programs will apply for and receive grants far more often than those with be-

---

96. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 711 (1970) (Douglas, J., dissenting). The significance of statistical disparities in the incidence of a benefit was the principal ground of contention between the majority and dissenters in *Mueller*. *Compare Witters*, 106 S. Ct. at 752, *with Walz*, 397 U.S. at 754 n.3 (Powell, J., concurring).

97. First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978); *see* Elrod v. Burns, 427 U.S. 347, 356 (1976); Police Dep't v. Mosley, 408 U.S. 92 (1972); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *supra* note 42. *But cf.* Regan v. Taxation with Representation, 461 U.S. 540 (1983) (tax exemptions denied to most organizations engaged in substantial political lobbying, but permitted to veterans' organizations); Buckley v. Valeo, 424 U.S. 1, 97-99 (1976) (per curiam) (subsidy for political campaigning provided to major parties but not to minor parties). *Regan* is defensible, if at all, because it constituted speaker-based discrimination and not viewpoint discrimination. Stone, *supra* note 42, at 244-51. *Buckley*, I think, is not defensible.

liefs and objectives that are irrelevant or inconsistent. Groups supporting family planning will apply for and receive family planning grants; groups opposed to family planning will not. Here again, the problem is more severe than in the religious context, because the extent of government spending is always a political issue. The effect of providing government grants to groups that engage in political lobbying is to subsidize those with a vested interest in continued or increased spending. Groups opposed to government programs—whether social or defense—will rarely receive money under them.

C. *Avoiding Governmental Advancement of Religious Ends*

The Supreme Court recently stated that one of the "few absolutes" is that the establishment clause "does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[98] Here, the Court strikes no new ground, for an element in the fundamental *Lemon* compromise was that government aid could only be used for the secular functions of religious organizations; government could allow no aid to be used for the spread of religious beliefs. The Court thus quoted *Lemon*: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . ."[99] One might fairly quibble with the sweeping way the Court has expressed itself. Although the principle is "absolute," the Court has permitted government assistance to be used for religious indoctrination if the aid is provided directly to the student and not to the institution and the student is free to choose religious or secular education.[100] To say that the State must be "certain" that aid to private schools is not used for religious indoctrination is to impose a higher burden than the State has for *public* school administration, where the danger also exists that teachers might introduce religious material into the curriculum. No one suggests that public schools should be defunded merely because we cannot be "certain" that teachers will not, for example, lead their classes in prayer. The solution is to use best efforts to avoid and correct specific abuses. Nonetheless, the underlying principle that gov-

98. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3224 (1985).

99. *Id.* at 3223 (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

100. *See supra* text accompanying notes 62-75 and *infra* text accompanying notes 162-71.

ernment funds should not be spent directly on religious indoctrination is, in general, well-established.

That principle is transferable to the political context. Whether understood as a constitutional principle, as in *Abood*, or as a legitimate governmental objective, as in *Taxation with Representation*, it accords with the constitutional value of freedom of speech—or more precisely, the right not to speak. This means that, as a minimum, the incremental costs of political lobbying or other forms of advocacy by private organizations should be borne by the organizations themselves.

D. Avoiding Indirect Support for Religious Activities

Even where government resources are not used directly for religious or political teaching or advocacy, the effect can be to create an indirect subsidy. It is useful to differentiate among three different forms of indirect subsidy. First, to the extent the government pays for activities that the religious organization would (or might, given greater resources) have performed, it frees up resources for the organization's other activities. Second, where the government-funded activity shares common or joint costs with the organization's religious activities—such as building or personnel costs—the government program may defray a portion of the costs of the religious activity. Third, where religious teaching or mission is inseparably intertwined with the provision of social services, aid to the social services program will also be aid to the religious mission. I will examine each of these indirect subsidy arguments separately.

1. *Displacement*

Whenever the government chooses to pay for an activity which a religious organization would otherwise have paid for, the church is able to use its resources elsewhere for religious ends. This effect is clearest where the government displaces a costly church activity—as, for example, if the government initiates funding of a church-operated and formerly church-funded soup kitchen. The money that formerly went to supply the kitchen can now be used for other church purposes, including, presumably, religious purposes. It makes little practical difference that the government money was used entirely for secular purposes; only the account books will register the difference. "Budgets for one activity may be technically separable from budgets for

others," as Justice Douglas pointed out. "But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its members."[101]

The Court applied this reasoning in some of the parochial school aid cases, where it said that "[s]ubstantial aid to the educational mission of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole."[102] This reasoning could equally be applied to grantees whose functions include political advocacy. Aid to one part of the organization is aid to the enterprise as a whole.

This line of argument has theoretical appeal, but it is difficult to know where it will lead or where it might stop. In *Grand Rapids*, for example, the Court held unconstitutional a program under which the public school district provided to parochial school students certain secular courses, available in the public schools, that were not a part of the regular curriculum of the private schools. The school district's argument was that the program did not benefit the participating private schools, since those schools would not have provided the supplemental courses in any event; the program solely benefited the children, who would not otherwise have had the opportunity to receive this supplemental instruction. The Court rejected this argument on the ground that "the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected."[103] The Court explained that under the school district's argument, the government could gradually "take over the entire secular curriculum of the religious school," thus leaving the schools free to devote their independently-generated funds to religious functions.[104]

---

101. School Dist. v. Schempp, 374 U.S. 203, 229, (1963) (Douglas, J., concurring) (footnote omitted).

102. Meek v. Pittenger, 421 U.S. 349, 366 (1975).

103. *Grand Rapids*, 105 S. Ct. at 3224 (1985).

104. *Id.* at 3230. The Court was technically incorrect on this point, since the school district's argument was premised on continuation of state accreditation standards, which require every school to maintain a core curriculum of certain basic courses. Since the private schools are required to provide these core courses (which are a significant portion of the elementary and high school curriculum), they would not be "supplemental" and could not, under the district's argument, be provided by the school district. The most that could be said is that the government might gradually take over portions of the curriculum that are secular but not core, and that this would be a significant benefit to the private schools. Even this is made difficult, if not impossible, by a statutory nonsup-

When thus taken to its logical conclusion, the indirect subsidy argument has devastating effect. It suggests that the government may not engage in any activity that might, in the absence of government action, be performed by religious organizations. Out of fear that it might displace religious organizations' efforts to their indirect benefit, the government would be forced to withdraw from the realm of social services in which government and church share a common interest. Since the functions of education and charity were performed in large part by religious groups in the early days of the Republic, it could be said that the government's decision to enter those fields "freed up" the church's resources for other activities and was, therefore, an indirect subsidy to religion. The argument answers itself.

The Court has never gone so far. In *Roemer v. Board of Public Works*,[105] the Court upheld noncategorical assistance grants to separately administered secular programs of religious colleges, despite the obvious fact that the colleges would thereby be able to devote a greater portion of their own resources to religious offerings. Prior to *Grand Rapids*, the Court repeatedly rejected the position that aid to one aspect of an organization's activities must be deemed, for establishment clause purposes, to be aid to all of the organization's activities.[106] Even in *Grand Rapids*, where the hypothetical indirect subsidy argument was carried the furthest, the Court reaffirmed the legitimacy of government-funded remedial education for parochial school children off the premises of the parochial school. Yet this frees the parochial school of the financial burden of providing remedial courses, no less than if they were in the school's own building.

The unacceptability of its logical consequences is sufficient reason to reject this version of the indirect aid analysis. But the underlying construct is troubling as well. It is one thing to say that the government must be indifferent to the effects of its programs on religious (or political) organizations, that it must seek neither to benefit nor to harm them. This is the substance of the

---

plantation requirement. *See infra* text accompanying notes 184-89.

105. 426 U.S. 736, 759-60 (1976) (plurality opinion).

106. Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658 (1980); Hunt v. McNair, 413 U.S. 734, 743 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 775 (1973); Tilton v. Richardson, 403 U.S. 672, 679 (1971) (plurality opinion); Garvey, *supra* note 75, at 75, 80-81. *Cf.* Grove City College v. Bell, 465 U.S. 555, 570-74 (1984) (applying similar approach under the "program or activity" language of the civil rights laws).

purpose test of *Lemon*. It is quite another thing to say that the government must forego programs, worthwhile on wholly secular grounds, solely because religious (or political) organizations might indirectly benefit from them. This is not neutrality toward religion, but hostility. The "indirect subsidy" argument is inconsistent with the fundamental assumption of *Lemon* and succeeding decisions that "sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian."[107] If taken seriously, the indirect subsidy theory would become in effect a "no-aid" theory.

2. Joint or common costs

A second form of indirect subsidy to the religious grantee arises from a sharing of joint or common costs between the government-funded activity and the grantee's religious activities. Assume that a church requires a copying machine (costing X dollars per year) to duplicate materials used in its religious program. If the church also conducts a government-subsidized public welfare program which uses the same copying machine to duplicate materials, then under ordinary cost accounting principles, the government program will reimburse the school for its use of the machine. If the two uses of the machine are roughly equal, the government would pay half the cost of the machine. This reduces the cost to the church's religious program by one half X.

Precisely the same problem arises when political-advocacy organizations receive government grants for the performance of services sharing common resources with their other activities. The government's share of the cost of the building, equipment, and personnel will be paid by the government; this reduces the cost to the organization of maintaining those resources for its own purposes, including political advocacy.

It can as easily be said however, that this sharing of resources benefits the government program. After all, the government program receives full use of the copying machine while paying only a portion of its cost. Indeed, one of the reasons the government makes grants to private organizations for performing social services rather than providing them directly is that it can take advantage of the resources already at the disposal of

107. *Nyquist*, 413 U.S. at 775.

the grantees.[108] One activity, then, does not "subsidize" the other; rather, each activity shares in the benefit of joint use of common resources. Although the government may prefer to avoid such common enterprises, it should be under no constitutional mandate to do so.

3. *Inseparable activities*

Perhaps the most controversial form of indirect subsidy occurs when religious grantees use taxpayers' funds in environments which are so pervasively religious that the funds will advance sectarian purposes. For example, if a parochial school conducts religious classes for a portion of the day, and for the remainder conducts secular classes taught in precisely the same way they would be taught in public schools, the *Lemon* compromise would be easy to administer. Government aid could support the secular classes but not the religious. In actuality, however, the two spheres are not so sharply differentiated. Parochial school history courses will presumably treat the role of church and religion differently than would a public school course. Sex education courses will be taught differently. A biology course in a fundamentalist school might bear little resemblance to that in the Bronx High School of Science. A religious theme in Dostoyevsky will receive different treatment in one environment than another. And this is not accidental. One of the reasons a religious organization might establish a school (rather than simply supplementing the public school curriculum with religion classes) is that it considers the secular treatment of subjects such as these to be inappropriate and incomplete—perhaps even sacrilegious and untrue. The *Grand Rapids* Court quoted the policy statement of a religious school involved in that case: "[I]t is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program."[109] Under these circumstances, the government cannot subsidize secular education without also subsidizing religious training.

The problem may be less acute outside the field of education; but it is present nonetheless. A breakfast program for the poor might be set up in the church basement. Around the guests

---

108. *See supra* text accompanying notes 47-48.

109. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3220 (1985) (emphasis deleted).

might be placed posters about the power of prayer, the nature of God's love, or the need for repentance. The food might be served by persons whose motivation is Matthew 25 or Isaiah 1, and who do not hesitate to say so. Grace might be offered. The overall impression conveyed may be highly favorable to religion in general, and to the particular church. Other social welfare programs administered under religious auspices would offer similar occasions for religious messages. Indeed, the mere fact that the religious organization has delivered a needed service may silently convey a religious message; and it may not always be known or understood that funding is from the taxpayer.

When organizations with a political agenda deliver social services, the problems will be analogous. The prospect of receiving the services will draw eligible persons to the organization; its status as service-deliverer will make those persons more receptive to its message; the delivery of the services will provide an opportunity for grass-roots political mobilization. Whether political or religious, the organization's own viewpoint will inevitably be advanced to some degree by the government subsidy, since it is unlikely that the organization will rigorously separate its provision of services from its espousal of a message.

E. Autonomy of Religious Organizations

The Supreme Court has based most of its decisions invalidating aid to religious organizations on the "entanglement" doctrine of *Lemon v. Kurtzman* rather than on "impermissible effects." The theory is that the autonomy of religious organizations is threatened when the government supervises their activities or agents, when the government seeks to determine which of a religious organization's activities are "secular" and which are "religious," and, most of all, when the government prevents a religious organization or its agents from engaging in activities the government deems "religious."

The Court's "entanglement" analysis is much criticized.[110] Some contend that it is a catch-22: aid must not be used for religious purposes, and any government efforts to enforce this restriction create a forbidden "entanglement."[111] And so it ap-

---

110. *See* Laycock, *supra* note 87, at 1392-94; Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. Rev. 337.

111. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3247-48 (1985) (O'Connor, J., dissenting); Wallace v. Jaffree, 105 S. Ct. 2479, 2518 (1985) (Rehnquist, J., dissenting);

pears in many of the Court's decisions since *Lemon*. However, the problem is not so much the *Lemon* principle itself, but the Court's tendency to require absolute perfection and to speculate regarding possible unconstitutional consequences.[112] To retain any coherence as a principle for decision, *Lemon* requires a degree of common sense and proportion in application. Otherwise it becomes a flat prohibition. Presumably that is why the *Lemon* Court used the language "primary" effect and "excessive" entanglement.

The concept of "entanglement" also applies in the political context. Even though other activities of nonreligious organizations may be open to public scrutiny, their political advocacy warrants protection from government intrusion. There is, first, the danger that the government's definition of "political" would, whether deliberately or unconsciously, be affected by approval or disapproval of the message. A report on the status of hunger in America, with a list of possible legislative responses, might appear political to an administration seeking to restrain welfare costs; a report on the safety record of the nuclear power industry and the costs of compliance with safety regulations might, on the other hand, seem an objective scientific study. Second, there is the danger that forcing private organizations to reveal the amount and nature of their political activities to the government would increase the risks of government retaliation, especially where government grants are awarded on a discretionary basis.[113] Finally, the invasion of associational privacy in itself might be considered troublesome. A private organization might legitimately object if its political positions and the amount of political lobbying it undertakes are made matters of governmental and public knowledge.

These problems seem precisely parallel to the "entanglement" analysis in the religion context. They might even be more severe in the political context, since government officials have greater incentive to intrude into political affairs. This suggests

---

Lemon v. Kurtzman, 403 U.S. 602, 668 (1971) (White, J., dissenting in part).

112. *See, e.g., Aguilar*, 105 S. Ct. at 3232 (1985); *Grand Rapids*, 105 S. Ct. at 3216 (1985); Meek v. Pittenger, 421 U.S. 349 (1975). In these cases, the danger that public school professionals might wittingly or unwittingly smuggle religious material into remedial math and English courses, merely because they took place on the premises of parochial schools, was deemed sufficient reason to disrupt longstanding and successful educational programs at the federal, state, and local levels.

113. *See* Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

that, to the extent that avoiding "entanglement" is a constraint on government assistance to religious organizations, the same constraint should operate in the political arena.

The Court has yet to face squarely the entanglement problems inherent in government subsidy of political activity. In *Buckley v. Valeo*, the appellants contended that "public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom."[114] The Court found the contention "speculative" on the record and—without rejecting it in theory—declined to consider it on a facial challenge to the statute.[115] But elsewhere the Court has recognized important rights of autonomy for political organizations and associations with a political purpose.[116] It is difficult to believe that the Court would fail, in an appropriate case, to see the consequences for political liberty that could arise from a system of government subsidies to political organizations with the attendant "strings." If it does not—if it determines that "entanglement" in the political context does not warrant constitutional attention—then perhaps the Court should consider whether it has overstated the dangers in the religious context as well.

Of the five principle reasons offered for prohibiting governmental financial aid to religious institutions, then, four would seem to apply equally or more strongly to private political advocacy. Only the first—avoiding the symbolism of church-state cooperation—seems less than fully applicable to the political context (and it is the least substantial of the five reasons). If the concern is with avoiding preferences for some groups over others, with preventing direct or indirect subsidies to advocacy, or with protecting the autonomy of private organizations, then establishment clause principles should be extended to govern financial assistance to the political advocacy of private organizations.

---

114. 424 U.S. 1, 93 n.126 (1976).

115. *Id. But cf.* Meek v. Pittenger, 421 U.S. 349 (1975) (holding statute unconstitutional on its face on "entanglement" grounds shortly after it had been enacted and before there was any more than a sparse evidentiary record).

116. *See, e.g.*, Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); *NAACP*, 357 U.S. at 449. *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984).

IV. The Relevance of Free Exercise and the Right to Speak

The goal of preventing compulsory support for religious or political causes should not, however, obscure the powerful constitutional values on the other side of the balance. Principal among these is the right to engage in political speech or religious activities with one's own resources and without suffering a penalty for doing so. The concept has been explained in the cases and commentary as the doctrine of unconstitutional conditions.[117]

In its simplest form, the doctrine of unconstitutional conditions holds that if an individual possesses a right as against the government, the government may not require waiver of that right as a condition to the receipt of a benefit—even though the person may have no inherent constitutional right to the benefit. A policeman may not have a constitutional right to his job, but he can not be required to surrender his right to criticize the government as a condition to holding it.[118] The theory is that the government may not deny grant funds or other benefits to an otherwise qualified organization merely because it engages in religious or political activities.[119]

FCC v. League of Women Voters[120] illustrates this approach. There, the Court held unconstitutional a statute prohibiting federally-funded noncommercial broadcasters from editorializing. The Court conceded that the government has a legitimate interest in refusing to subsidize the expression of pri-

---

117. Perry v. Sindermann, 408 U.S. 593 (1972), is the leading free speech case. Academic writings on the issue include: French, *Unconstitutional Conditions: An Analysis*, 50 Geo. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 Calif. L. Rev. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

118. The contrary view of this hypothetical was most famously stated in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (Holmes, J.).

119. I do not here consider the much weaker argument that some persons or groups have, or should have, a constitutional right to funding of their advocacy. *See* Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) ("[T]he notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State . . . runs counter to our decisions . . . and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights.") (citations omitted).

120. 468 U.S. 364 (1984).

vate political opinions with which taxpayers may disagree.[121] But it held that the government could not prevent all editorializing by a broadcaster merely because a fraction of its funding came from government sources.[122] The Court distinguished *Regan v. Taxation with Representation*,[123] which upheld withdrawal of tax deductible status from nonprofit organizations that engage in substantial political lobbying, on the ground that tax exempt organizations are permitted to segregate their political from their charitable activities and continue to receive tax deductible contributions for the latter. In contrast, a public broadcaster could not establish a separate affiliate for the purpose of delivering editorials and thereby maintain the station's eligibility for public broadcasting grants.[124]

The *League of Women Voters* analysis is not without its difficulties. As Justice Stevens pointed out in dissent,[125] the unconstitutional conditions doctrine may be inapplicable because the broadcasters subject to the editorializing ban were merely denied *privileged* access to a federally subsidized medium of expression. Their right to communicate their views through other media, on equal footing with everyone else, remained unimpaired. Moreover, even assuming that the affected broadcasters have a speech interest that was infringed, it is not clear why the government's conflicting interest must automatically yield to it; in analogous contexts, a different balance has been struck.[126] Finally, the unconstitutional conditions doctrine has knotty conceptual problems of its own. Many fundamental constitutional rights are exercised or waived in return for government benefits every day, with only law professors raising an eyebrow.[127] And the "denial of a benefit" may be no more than the

---

121. *Id.* at 395-96.

122. *Id.* at 400-01.

123. 461 U.S. 540 (1983).

124. *League of Women Voters*, 468 U.S. at 400 ("A station is not able to segregate its activities according to the source of its funding.").

125. *Id.* at 412-13 (Stevens, J., dissenting).

126. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947).

127. I have the right to speak as I choose, but if the state hires me as a law professor, it can legitimately insist that I teach law and not physics. *See* Van Alstyne, *supra* note 117, at 1448 ("The basic flaw in the [unconstitutional conditions] doctrine is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government. . . . [T]he connection with the government may in certain circumstances make otherwise unreasonable conditions quite reasonable.").

government's refusal to pay (directly or indirectly) for conduct it chooses not to encourage.

This article is not the occasion for yet another attempt to sort out the problem of unconstitutional conditions. The issue here is solely whether there is any reason to apply the doctrine differently in religious and political contexts; there can be little doubt that it has been so applied. The Roman Catholic Church has a constitutional right to incorporate religious teachings into its school curriculum. But if it does so, it loses its statutory entitlement to government aid for the secular aspects of its curriculum. Only a secular private school can receive the aid. Similarly, parents have the constitutional right to educate their children in a religious school,[128] and they have a statutory right (if otherwise eligible under Title I) to remedial education services for their children on the premises of the child's regular school.[129] But if they exercise the constitutional right, they forfeit the statutory right.[130] If the unconstitutional conditions doctrine were applied in these contexts with the vigor with which it was applied in *League of Women Voters,* the outcomes might well be different.

The difference cannot be explained simply on the ground that establishment clause prohibitions are more exacting than their political counterparts. The theory underlying the religious "unconstitutional conditions" discussed in the previous paragraph is that, in the absence of the conditions, the government's aid programs would violate the establishment clause. This provides a justification for imposing conditions restricting religious choice that would otherwise be unconstitutional. But if the government likewise has a "legitimate and significant" interest in "minimizing the use of taxpayer moneys to promote private views with which the taxpayers may disagree,"[131] the political cases are not so different after all. In either context, the government can protect its interest only by imposing a condition that constricts the individual's choice of political or religious activity.

In either context, the fundamental issue is the relationship between the government and the religious or political activity

---

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

129. *See* Wamble v. Bell, 598 F. Supp. 1356 (W.D. Mo. 1984) (statutory holding), *appeal dismissed for want of juris. sub nom.* Wamble v. Bennett, 105 S. Ct. 3549-50 (1985).

130. Aguilar v. Felton, 105 S. Ct. 3232 (1985).

131. FCC v. League of Women Voters, 468 U.S. 364, 414 n.7 (1984) (Stevens, J., dissenting).

involved. Whether a governmental program would be constitutional in the absence of the limiting condition depends on whether the program is properly characterized as supporting religion (or political advocacy) or as government neutrality towards religious (or political) choice. Does a public broadcaster's editorial become "government-sponsored speech" when he receives a subsidy from the federal government? Does instruction by a religiously-oriented high school become "government-sponsored speech" when the students attending receive tuition tax credits or government-funded remedial education? The problem is how to distinguish between infringing free speech (whether political or religious) and denying government support for the propagation of opinion. Whatever view one takes of the relative strengths of constitutional policies against support for religious and political advocacy, this issue cannot be avoided.

The Court's failure to recognize the impact of its separationist doctrine on religious choice has caused it consistently to err on the side of penalizing religion relative to secular alternatives. By contrast, the message of the political free speech cases, such as *League of Women Voters,* is that the government's legitimate interest in not subsidizing private advocacy must be tempered by the consequences for privately-supported speech. Where strict separation of political and other functions is not practicable, the Court has protected the freedom of political speech even at the cost of allowing government subsidy. Pervasively religious educational institutions may be entitled to similar consideration.

V. Mechanisms for Preventing Public Resources from Being Used for Private Advocacy

Various devices have been used in different contexts to prevent compelled support for religious or political advocacy. These range from the posting of disclaimers, at one extreme, to forbidding religious or political organizations to participate in public programs, at the other. I will examine each of the most important of such devices in light of the arguments and rationales explored in previous sections.

A. Disclaimers

Labeling government-supported advocacy as "private" is sometimes thought sufficient to dispel inferences of government

favoritism or support. In *FCC v. League of Women Voters*,[132] for example, the Court suggested that government could satisfy its legitimate concern simply by requiring public broadcasters to "broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government."[133] Justice Stevens, dissenting, commented that the majority's disclaimer proposal "would be laughable if it were not so Orwellian: the answer to the fact that there is a real danger that the editorials are really government propaganda is for the government to require the station to tell the audience that it is not propaganda at all!"[134] In contrast to *League of Women Voters*, the Court in *Grand Rapids*[135] treated as inconsequential the requirement that parochial classrooms in which government-funded remedial courses were provided be prominently marked as public school classrooms.

Nevertheless, the *League of Women Voters* Court is presumably correct that a disclaimer is an adequate and appropriate device when the only problem with government subsidies is that some persons might mistakenly infer that the government supports or endorses the advocacy it subsidizes.[136] It is convenient and unintrusive; it has minimal effect on free speech rights. It is difficult to understand why anything more than a disclaimer should be required in such a case. A disclaimer should therefore be the remedy when the danger is the "symbolic union" of government and private advocacy.[137] But disclaimers are not a sufficient answer to any of the other dangers of government involvement with private advocacy outlined above. Justice Stevens is surely correct in this regard. Where government distortion of the marketplace of ideas is more than symbolic, a symbolic response is worse than nothing: it is misleading and hypocritical.

---

132. *Id.* at 364.

133. *Id.* at 395.

134. *Id.* at 417 n.10.

135. 105 S. Ct. 3216, 3220 n.2, 3227 (1985).

136. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986) ("The disclaimer serves only to avoid giving readers the mistaken impression that [one group's] words are really those of [another]."); PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

137. *See supra* text accompanying notes 88-93. A good example is McCreary v. Stone, 739 F.2d 716, 727-28 (2d Cir. 1984), *aff'd mem. by an equally divided Court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985), in which a privately owned and financed nativity scene on public property was required to bear a sign so indicating. *Accord* Allen v. Morton, 495 F.2d 65, 67 (D.C. Cir. 1973) (per curiam).

B. Opting Out

In *Abood v. Detroit Board of Education,*[138] the Court implicitly endorsed a remedy by which dissident workers could opt out of the compulsory dues requirement to the extent that dues were used for political advocacy. Past exactions would be returned; future dues would be reduced, pro rata, by the percentage of union expenditures used for political advocacy. Union members who did not complain would continue to pay full dues.

Opting out is a sensible remedy, provided certain conditions are satisfied. First, the compulsory funding scheme must entail direct transfers from individuals to the organizations engaged in advocacy; it is not a realistic remedy when individuals pay money into a common fund which finances many activities, including advocacy. The remedy, therefore, is not appropriate as to expenditures from general tax revenues.[139] Second, the permissible and impermissible activities must be segregable. If it is not possible to determine the proportion of expenditures made for impermissible advocacy purposes, then the remedy cannot be calculated. Third, the burden on the objecting individuals must be negligible. If obtaining a refund requires significant effort,[140] or if opting out would subject the dissident to embarrassment, pressure, or invasion of privacy, the remedy is not adequate. In *Abood* itself, the latter objection should have been accorded greater weight. The Court acknowledged that requiring a worker to divulge the "specific causes to which [he] is opposed" would burden first amendment rights and subject him to reprisals.[141] But the Court was willing to countenance a system under which the dissident was required to reveal his opposition to the union's political agenda as a whole. It is not clear that this solved the problem.

Although in some circumstances the opting-out remedy may be adequate to vindicate the individual's right not to be compelled to support speech with which he disagrees, it does little to prevent other systemic dangers resulting from government support of advocacy. Foremost is the problem of government favoritism. Take the example of *Galda v. Bloustein.*[142] There, a state

---

138. 431 U.S. 209, 235-42 (1977).

139. *See* M. YUDOF, *supra* note 1, at 205.

140. *See, e.g.*, Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982).

141. 431 U.S. 209, 241 & n.42 (1977).

142. 686 F.2d 159 (3d Cir. 1982).

university required students to contribute to a private "political entity devoted to the attainment of certain fixed ideological objectives."[143] The court of appeals, following *Abood,* ordered a workable system for students to opt out of participation. The court left intact the use of the government's resources to promote and collect the contributions from willing students. But why should the government favor this political group over others with different ideological objectives? To the extent that the constitutional value is that the government remain neutral among competing political, and religious, views,[144] such a scheme is highly suspect. To allow dissidents to opt out does not diminish the tendency of the scheme to skew the political process.

This analysis may help to explain an interesting difference between the flag salute cases and the school prayer cases. In *West Virginia State Board of Education v. Barnette,*[145] the remedy was to permit children who objected to the flag salute to opt out of participation. In *Engel v. Vitale,*[146] the remedy was to enjoin school authorities from offering prayers. One reason for the difference might be that opting out of the flag salute could be done less conspicuously or it was thought by the Court to entail less peer pressure. These are factual distinctions and, while plausible, do not seem particularly persuasive. A more likely reason for the difference is that in the school prayer cases there was an additional constitutional concern that the government not take sides in favor of one or another religion.[147] This would be analogous to the problem in *Galda.* The Court, quite reasonably, did not perceive any problem with the government's taking sides in favor of its own pledge of allegiance. Accordingly, opting out was an adequate remedy in *Barnette,* even if not in *Engel.*

Even assuming the adequacy of opting out in some circumstances, difficult questions arise when it is not a practicable alternative. If any of the necessary conditions is absent, then the government must choose between terminating support for the private advocacy and denying protection to the dissident indi-

---

143. *Id.* at 166. The organization in question was the New Jersey Public Interest Research Group.

144. *See supra* text accompanying notes 94-97.

145. 319 U.S. 624 (1943).

146. 370 U.S. 421 (1962).

147. The Regents' prayer in *Engel* was "nondenominational," but even a nondenominational prayer is an endorsement of one form of prayer (nondenominational) over others.

vidual. Since the conditions for opting out are somewhat unusual, other remedies must be sought in most cases.

C. *Prohibition of Taxes Specifically Earmarked for Use by Religious or Political Groups*

As discussed above, the viewpoint-specific character of religion, as opposed to politics, suggests that evenhanded government support for political advocacy may be permissible even if such support for religious advocacy is not.[148] An important qualification, however, is that government may not compel a person to make contributions directly to an organization engaged in political advocacy. Support must be from a common pool.

A single factual context will best illustrate the point. Again I will use the example of *Galda v. Blaustein*—mandatory student activity fees at a state university. The Court held it unconstitutional to require students to pay a fee specifically earmarked for the use of a private ideological group.[149] The courts have taken pains, however, to distinguish this from the use of general student activity fees for "speakers or campus organizations that present controversial views."[150] Why this distinction? If a person has the right not to be compelled to support the propagation of opinions with which he disagrees, what difference should it make whether the forced support was specially earmarked or whether it was an appropriation from general revenues? At least three considerations support the distinction.

The first consideration is the dignitary interest. To force a person to pay money directly to a private organization for the purpose, in part, of obnoxious political advocacy differs from merely requiring him to pay taxes to a treasury which funds many projects, good and bad alike. The point is accentuated when, as in *Galda*, supporters (whether or not voluntary) are considered "members." The Court expressed this notion when it distinguished *League of Women Voters*[151] from *Wooley v. Maynard*,[152] which struck down a state law requiring auto owners to display a license plate stating "Live Free or Die." According to

148. *See supra* text accompanying notes 42-47.

149. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1375 (1986); *see also* Galda v. Bloustein, 686 F.2d 159, 166 (3d Cir. 1982).

150. *Rutgers*, 772 F.2d at 1067.

151. 468 U.S. 364 (1984).

152. 430 U.S. 705 (1977).

the Court, using general tax revenues to subsidize editorials by public broadcasters "is not a case in which an individual taxpayer is forced in his daily life to identify with particular views expressed by educational broadcasting stations."[153]

Second, and more concretely, the causal link between the forced exaction and the support for private opinion is much clearer if the tax is earmarked. If the unconstitutional expenditure is eliminated, the unwilling contributors will get back their money. By contrast, where the appropriation is made from the general treasury, there is no reason to believe that ceasing the unconstitutional activity will have any measurable impact on the taxpayer. The government may spend the money on something else. The law of standing reflects this point. Although taxpayers generally do not have standing to challenge the constitutionality of federal government expenditures,[154] standing exists to challenge expenditures funded by a special tax.[155] If the expenditures cease, the tax will cease.

The third consideration is the possibility of neutral administration. When taxes are paid into general revenues (or in the student analogy, the student activity fund), it is at least theoretically possible that expenditures to support one cause will be balanced by expenditures to support other opposing causes. The assumption is that in administering the fund, "a university will strive for balance and afford adequate opportunity to opposing viewpoints."[156] The overall effect may be not to force the taxpayers to support a cause with which they disagree, but to create a forum of expression of diverse viewpoints.[157] However, when a fee is specifically earmarked for a particular organization—a union, or a student ideological group—one can be certain that

---

153. *League of Women Voters*, 468 U.S. at 385 n.16; *accord* PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

154. Frothingham v. Mellon, 262 U.S. 447 (1923). The significant exception is that taxpayers may challenge at least some federal expenditures alleged to be in violation of the establishment clause. Flast v. Cohen, 392 U.S. 83 (1968).

155. United States v. Butler, 297 U.S. 1, 57-61 (1936); *see also Flast*, 392 U.S. at 128 (Harlan, J., dissenting).

156. Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1375 (1986). Of course, this balancing may not be possible in practice. Accordingly, some universities (including the University of Chicago) prohibit the use of mandatory student fees for religious speakers or those who advocate specific candidates or political positions.

157. *Id.; see also* Buckley v. Valeo, 424 U.S. 1, 92-93 (1975) (per curiam) (The campaign finance scheme "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion . . . .").

the effect will not be neutral. It makes sense, therefore, to have a per se rule against compelled exactions earmarked for the use of private organizations engaged in advocacy, but to allow such support out of general revenues provided it is allocated on an evenhanded basis.[158] In the latter situation, the elected branches would have a legitimate interest in denying aid for the purpose of advocacy,[159] but no constitutional provision would require it.

This is not the rule applied in the religious context, though it should be. In deciding questions involving the use of government funds to support religious education, the Court has relied heavily on James Madison's famous *Memorial and Remonstrance Against Religious Assessments.*[160] The proposed religious assessment against which he remonstrated, however, was not an appropriation from general revenues but a compelled contribution by taxpayers directly to the coffers of the various religious societies of Virginia. When the parochial school aid cases arose in the middle part of this century, Madison's argument was used as a rationale for forbidding expenditures from general revenues, apparently with no attention to the possible distinction.[161] Provided that religion is not singled out for special support—i.e., that comparable secular institutions are included in the program—and that no other constitutional problems are present, government support from general revenues should be permitted.

D. Indirect Aid

As discussed above,[162] the law draws a bright-line distinction between "direct grants" from governments to organizations, and "indirect aid," wherein the government provides money to individual beneficiaries who then use the money to obtain services from private organizations. If the government gives a college X dollars for every qualifying student it enrolls, the arrangement is a direct grant. If the government instead gives each

---

158. This helps reconcile *Buckley* and *League of Women Voters* with *Abood*, which otherwise appear to stand for quite different constitutional principles. *See supra* text accompanying notes 138-47. Only in *Abood* were an individual's forced contributions earmarked for a particular organization with an ideological message.

159. Regan v. Taxation with Representation, 461 U.S. 540 (1983); *see League of Women Voters*, 468 U.S. 364, 399 (1984).

160. Reprinted as an appendix to the dissenting opinion of Justice Rutledge in Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947).

161. Flast v. Cohen, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting).

162. *See supra* text accompanying notes 62-75.

qualifying student an entitlement to X dollars for college tuition, the arrangement is indirect aid. Under the former arrangement, a host of federal mandates become applicable to the college by virtue of statute and regulation, and the establishment clause requires that the government ensure that its funds not be spent for religious indoctrination. Under the latter arrangement, the funds are treated as losing their governmental character when they go through the hands of the individual beneficiary; no federal mandates (other than the four civil rights statutes) apply; and the institutions are free to use the proceeds of the tuition for whatever purposes they choose, including religious or political indoctrination. This much is current doctrine. But is the current doctrine defensible? Should the indirect character of the grant absolve the government from the responsibility to ensure that tax funds are not used for private advocacy?

The distinction between direct grants and indirect aid is, in one sense, purely formal. The economic incidence of the two arrangements is virtually identical. A direct grant program can be restructured as an indirect aid program without sacrificing any of the program's objectives.[163] While an indirect aid program can be characterized as "aid to the students" and a direct grant program as "aid to the institution," in truth the benefit will be divided between them.

More precisely, there are three possible consequences of aid to private schools. First, the aid might decrease the cost to the parents of sending their children to private school. Second, the aid might relieve financial burdens on the schools themselves. Third, the aid might enable the institutions to provide higher-cost or better-quality education. These three possible consequences correspond to three commonly stated objectives of parochial school aid: (1) to provide fair treatment to parents who pay both taxes and tuition, or, alternatively, to expand the choices of less affluent students; (2) to maintain the financial viability of private education; and (3) to improve the quality of private education. The first and third purposes are seemingly legitimate; the second is at least questionable. It is tempting to say that indirect aid (vouchers, tax credits, and the like) and in-kind assistance (textbooks, remedial courses, and the like) are permissi-

163. Of course, there is little or no "entanglement" in connection with an indirect grant program. *See* Mueller v. Allen, 463 U.S. 388, 403 (1983). But this is solely because it has not been thought necessary under the "primary effect" test to prevent indirect aid from being used for religious purposes. If it were, there would be no less entanglement.

ble, since they correspond to the first and third purposes, respectively; and that direct aid to the institution is impermissible because it corresponds to the second purpose. And perhaps there is something to this. The difficulty, however, is that all three forms of aid will, to some degree, have all three effects. The actual incidence of the three forms of aid will depend on such factors as market power and the elasticity of demand. We cannot even say with confidence that a voucher will benefit the parents more than the school; perhaps the school will raise its tuition for the full amount of the voucher. Conversely, under some competitive circumstances, a school that receives direct aid might be forced to pass the benefit on to the parents in the form of tuition reductions or more expensive services. To distinguish between direct and indirect aid on this basis is, therefore, not ultimately satisfactory.

The Court itself has provided no explanation for the distinction between direct grants and indirect aid. Chief Justice Burger has commented that the reasons for the distinction are "admittedly difficult to articulate."[164] The answer, he says, "lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."[165] The Justices' experienced judgment should not be too lightly dismissed—especially in light of the fact that the same distinction is employed without controversy in other fields of federal grant law. A distinction so firmly embedded in the law, both constitutional and nonconstitutional, merits closer scrutiny to determine whether, beneath the formalism, there might be a persuasive justification.

Three points might support the distinction. The first is symbolic. When money flows directly from the government to an institution, there is a powerful appearance of government support. When government funds go to an individual, his selection of a religious supplier of educational services is and appears to be his own choice. The causal link between government aid and benefit to the institution is interrupted by an independent actor,

---

164. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 802 (1973) (Burger, C.J., concurring in part and dissenting in part).

165. *Id.; see also* Lemon v. Kurtzman, 403 U.S. 602, 621 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).

with the independent power to choose. This is apparently what the Court meant when it characterized indirect aid as an "attenuated" benefit to the institution.[166] To the extent, therefore, that the "symbolic union" of church and state is an independent constitutional concern, the direct-indirect distinction may carry some weight.

Second, a distinction must be drawn at some point in the chain of causation between government action and all the ensuing benefits, lest all activities in society be transformed into government action. The government subsidizes tuition at a university, so the university "benefits" from the aid. The university buys library books, so the publishers "benefit." The publishers hire typesetters, who buy groceries for their families; so the grocers "benefit." And so on. If at every link in the great chain of being, the beneficiary of government action becomes, in effect, an arm of the government for purposes of the first amendment,[167] the sphere of individual liberty would be greatly constricted. Given the need for a point of distinction, it makes sense to draw the line where an independent actor first receives full value for his money. In the instance of indirect aid, this occurs when the student pays tuition to the university. In the instance of direct aid, this occurs only when the university buys books, pays salaries, and the like. An arms-length, mutually-beneficial transaction admittedly benefits both parties, but it should not be viewed as "aid."

Finally, the direct-indirect aid distinction serves as a low-cost proxy for a more subtle and important distinction. One of the preeminent purposes of the establishment clause, as well as of the content-neutrality requirements of the free speech clause, is to ensure that the government cannot throw its weight behind any particular points of view in preference to others.[168] If it gives aid to institutions only as a result of the "genuinely independent and private choices of aid recipients,"[169] then this purpose of the first amendment is secured. Thus, as a general rule, indirect aid,

---

166. Mueller v. Allen, 463 U.S. 388, 400 (1983); *see also* Allen v. Wright, 468 U.S. 737 (1984); *Walz*, 397 U.S. at 675-76.

167. Indeed, government beneficiaries could become an arm of the government for purposes of any governmental limitation or responsibility. This is the crux of the debate over legislative modification of the holding in Grove City College v. Bell, 465 U.S. 555 (1984).

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

169. Witters v. Washington Dep't of Serv. for the Blind, 106 S. Ct. 748, 752 (1986); *see also Mueller*, 463 U.S. at 398-400.

where individual beneficiaries are free to choose among a wide range of provider institutions, should be presumptively appropriate and constitutional, while direct grants to religious or political advocacy organizations should continue to receive careful scrutiny.

On this reasoning, the campaign finance scheme in *Buckley v. Valeo*[170] is flawed. Its allocation of greater funds to the Republicans and Democrats than to the minor parties is obviously unfair; but so would be any other scheme. It would be ludicrous to give equal amounts to the Republican, Democratic, Libertarian, Vegetarian, Temperance, and More-Pay-For-Law-Professors parties. Nor would it make sense to give subsidies this year according to performance last year (minor parties wax and wane too quickly). And if parties received funding according to their membership, small parties would have little ability to reach out and persuade others, while large parties would be insulated against the effects of dwindling enthusiasm. Unless we want the relative resources available to candidates for office to be determined in Washington, rather than by the spontaneous and independent decisions of donors, we must reject the system of direct grants. In politics as well as religion, each group should be permitted to "flourish according to the zeal of its adherents and the appeal of its dogma"[171]—not according to the government's vision of a fair result. If the purpose of campaign finance proposals is to correct for the uneven distribution of wealth among potential political donors, then a system of indirect subsidies, through tax deductions, credits, or vouchers (in the form of refundable tax credits) should be used.

E. Accounting Separation or Physical Separation

Where direct grants are made to organizations engaged in religious or political advocacy, there are two basic approaches to ensuring that government funds are not used for the organization's advocacy. The first is to require an accounting separation of activities, under which all the direct costs of religious or political advocacy, plus a percentage of indirect costs, must be borne by the organization's private sources of funds.

The second approach is to require an actual physical separation between advocacy activities and government-funded ac-

170. 424 U.S. 1 (1976).

171. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

tivities. Under this method, only those activities that are clearly unrelated to religious or political advocacy may be supported by government funds; no joint or common costs of advocacy can be allocated to the government-funded program. The purpose of physical separation is to ensure that major items of overhead paid for by the government are not used, even in part, for religious or political activities. The Title I regulations for remedial education on the premises of parochial schools are a model.[172] Under these regulations, not only were personnel not mixed (the Title I teachers engaged in no other teaching in the parochial schools) but all equipment used in Title I was stored in locked compartments and used solely for Title I purposes. The existence of the Title I program thus did not decrease the overhead costs of the regular parochial school program.[173]

The reasons for choosing between accounting separation and physical separation are straightforward. Both approaches provide reasonable assurance that government funds are not used directly for purposes of religious or political advocacy. As has been discussed, this is a major objective of first amendment principles in this area,[174] and it is all that has been required, under either Supreme Court precedent or federal law, outside the area of primary and secondary school aid.[175] But an accounting separation is no obstacle to any of the forms of indirect subsidy outlined in section III above,[176] while a physical separation is a remedy for two of the three forms. Only a physical separation can prevent aid to the non-advocacy aspects of an organization's activities from accruing to the benefit of its advocacy by defraying a portion of the joint or common costs, and only a physical separation can preclude the intertwining of the government-funded activity and the organization's political or religious advocacy. Neither physical nor accounting separation can pre-

---

172. 34 C.F.R. §§ 200.70-200.75 (1985).

173. One item of overhead, the building, was shared between the Title I program and the parochial schools. However, since the Title I program did not reimburse the schools for the allocable share of the building expense (contrast Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3219 (1985)), this was effectively a subsidy from the parochial schools to the Title I program—and of no constitutional concern. Given this background, the danger of indirect subsidy through sharing of overhead could have provided no basis for the *Aguilar* Court's conclusion that the Title I program had to be moved off the premises of the parochial schools.

174. *See supra* text accompanying notes 98-100.

175. *Id.*

176. *See supra* text accompanying notes 101-09.

vent the third form of indirect subsidy—government displacement of the financial burden of providing services formerly funded by the organization. Moreover, an additional advantage of physical separation is that it decreases the entanglement caused by having to determine which of an organization's costs are allowable and which are not. On the other hand, physical separation can substantially increase the cost of providing services. The organization's advocacy helps defray the overhead costs of its services, just as its government-funded services help defray the overhead cost of its advocacy.

Which method to use was the subject of recent consideration within the executive and legislative branches. In 1983, the Office of Management and Budget published a notice in the Federal Register proposing new cost principles for political advocacy by contractors and grantees.[177] The proposal was based on the physical separation concept. It was similar to the principles used under Title I for remedial education of parochial school children. The proposal listed various items of common cost, and—with some exceptions—forbade federal reimbursement for any part of the cost of items that were also used on a nontrivial basis for lobbying or grass-roots political action. The purpose, according to OMB, was "to ensure that federal contracts and grants are not used to support political advocacy either directly or indirectly."[178] Although they received support from many individual members of the public,[179] the proposals were strongly criticized by contractors and grantees, the Comptroller General, and some members of Congress.[180] The burden of their comments was that the physical separation approach proposed by OMB would be costly, would depart from generally accepted cost-allocation principles, and would violate the free speech rights of contractors and grantees. As a consequence, and after negotiations among OMB, the Comptroller General, and affected parties, OMB ultimately issued cost principles based on an accounting separation approach.[181] The general rule under

177. 48 Fed. Reg. 3,348 (1983).

178. *Id.* at 3,349.

179. OMB received approximately 48,300 comments on the proposal, of which approximately 16,500 opposed the proposal and 31,800 supported the proposal or suggested taking more stringent steps to prevent use of tax moneys for political activities. *Id.* at 50,860.

180. These comments are summarized in H.R. REP. No. 82, 98th Cong., 1st Sess. (1983).

181. *See supra* note 61 and accompanying text. For an account of this controversy,

these cost principles is that joint costs are allocated, pro rata, to the grant- and lobbying-related activities of a grantee according to relative frequency of use.

Where physical separation is reasonably convenient, it is the preferable alternative. Only physical separation can minimize the problems of indirect subsidy and entanglement. It is not, however, always (or even often) feasible. Where physical separation is not feasible, the only alternatives are to move to an accounting separation or to prohibit aid altogether. The tendency in the parochial school cases is for the Court to conclude that the schools must forego aid. The tendency in the political area is for the Court to conclude that accounting separation must suffice,[182] and even to find that a tighter system of controls is invalid.[183] My own conclusion is that an accounting separation is all that the Constitution can sensibly require in most cases; that the legislative and executive branches can require a physical separation where feasible; but that where a physical separation is tantamount to denying an otherwise eligible organization's right to participate in a government program because of religious or political advocacy conducted with its own resources, the injury to free speech and religious liberty is too great to tolerate. This is roughly the resolution that has been reached by the political branches, and by the Court outside the volatile area of elementary and secondary parochial schools. I believe that the constitutional law of government aid to private organizations ought to be revised to bring the parochial school cases in line with doctrine applicable elsewhere.

F. Nonsupplantation or Maintenance of Effort Requirements

Nonsupplantation or maintenance of effort requirements are a partial solution to the remaining form of indirect subsidy not addressed by either the accounting or physical separation method: the freeing-up of resources by displacing activities formerly funded by the religious or political organization.[184] The basic idea is to condition the grant on the organization's agreement to continue to provide the subsidized service with its own

---

see Breger, *Halting Taxpayer Subsidy of Partisan Advocacy*, HERITAGE FOUNDATION LECTURES, No. 26 (1983).

182. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

183. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

184. *See supra* text accompanying notes 101-07.

funds to the same degree as before the grant. Grant funds will therefore increase the amount of the service being delivered, rather than free up resources to be used for the organization's other activities, including political or religious advocacy. The requirement can be framed in terms of continuing past expenditures ("maintenance of effort" requirements) or in terms of providing the same level of services that would have been provided in the absence of the grant ("nonsupplantation" requirements), or both.

In *Aguilar* and *Grand Rapids*,[185] there were elaborate nonsupplantation requirements. The educational programs in the two cases were strictly limited to courses that the private schools did not, and would not, otherwise provide. The Title I program in *Aguilar* was subject to a particularly strong nonsupplantation requirement, which guaranteed that Title I students received the full share of educational services from the regular school that the other students received; the Title I program was strictly supplemental.[186]

The Court disregarded the nonsupplantation requirements in these cases, essentially for two reasons.[187] First, the Court stated that the "distinction between courses that 'supplement' and those that 'supplant' the regular curriculum" is not "clear."[188] This is true enough. Application of nonsupplantation provisions in a variety of grant areas are notoriously troublesome.[189] There is, however, a vast body of administrative experience in interpreting such requirements, and while there inevitably are difficult problems at the margin, the provisions constitute a serious constraint against a simple transfer of resources from the privately-financed to the publicly-financed side of the account books.

Second, the Court pointed out that over time, the nonsup-

---

185. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

186. *See* Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985); 34 C.F.R. § 200.72(a) (1985). The *Grand Rapids* requirement that the services be supplementary and nonsubstitutionary accomplished approximately the same end.

187. A third reason—that the "general subject matter" of the courses had "surely" been a part of the curriculum in the past—disregarded the special character of the remedial and enrichment programs involved, which called for individual or small group training of a specialized nature. Such programs for exceptional or educationally disadvantaged children are often beyond the means of inner-city private or public schools.

188. *Grand Rapids*, 105 S. Ct. at 3230.

189. *See* 1 R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS § 4:10 (1982).

plantation requirement would lose its bite; the government-subsidized portion of the curriculum could grow beyond all reasonable bounds. This is a more serious objection. In the long run, as elements of the curriculum once provided by the private school become out of date, adjustments will render the nonsupplantation requirements less meaningful. But we should not exaggerate the problem. Elements of the core curriculum (English, math, basic science, history, and the like) will remain a part of elementary and secondary schooling for some years to come. So long as the long run has not yet arrived, and the nonsupplantation requirements continue to have practical effect, there is reason to consider them a valuable tool for preventing grant programs from subsidizing the recipient organization's other activities.

G. Prohibition

The final means of preventing the use of government funds for private political or religious advocacy is to deny all government aid to organizations substantially engaged in the propagation of religious or political opinion. Since the symbolic connection, the possibility of indirect subsidy, and the problem of entanglement can never be entirely eliminated, it is argued, the best course is for the government to remain entirely aloof from such organizations. In the religious context, this "no-aid" view once commanded nearly a majority of the Supreme Court; today it is rejected by all of the Justices. In the political context, the proposal has some support in Congress—though apparently far short of a majority.[190]

The reason for rejecting this alternative, for both religious and political organizations, is that it fails to honor the distinction between advocacy conducted with an organization's own resources and advocacy subsidized by the government, or to recognize the coercive effect of cutting an organization off from all government aid. The attempt to prevent government subsidy of private advocacy becomes, in effect, a penalty for privately-funded and privately-conducted advocacy. This is true whether the context is a community feeding program that lobbies for the poor or a school that teaches the tenets of its faith to students.

---

190. *See* S. 320, 99th Cong., 1st Sess. (1985); *The Federal Neutrality Act, Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. (1984). This bill would bar all tax-exempt organizations engaged in political advocacy, broadly defined, from participating in federal grants.

In neither case is a "no-aid" posture by the government neutral. In both cases, a rigid insistence on separation places persons who wish to exercise constitutionally protected rights at a disadvantage relative to others. If stretched so far, the first amendment values at stake turn back on themselves.

VI. Conclusion

The advent of the welfare-regulatory state has vastly increased the conflicts between government power and the rights of individuals. Many of the more important conflicts today have little to do with the government's direct powers of coercion, but arise from its command over national resources. One recurring problem is the need for government to remain neutral in the competition of ideas. This concept of neutrality, expressed in terms of individual rights, is the right of individuals to refuse, if they wish, to support the propagation of religious and political opinion by other private individuals or groups.

Constitutional doctrine has developed on two quite separate tracks, one concerned with religion and one with politics. The religion cases have, by and large, shown an acute awareness of the dangers of government support for the propagation of opinion, either by one church or by all churches. These cases have been less sensitive to the coercive pressures of the government-subsidized environment on religious rights. If all that the government touches must be secular, an increase in the scope of government activity inevitably reduces the sphere of religious choice. If the government offers a free education to those who are willing to forego a religious dimension to their schooling, for example, but declines to support the secular aspects of the education of those who choose a religious alternative, religious choice is plainly constrained. The Court has been peculiarly inattentive to this side of the problem.

The political cases, by contrast, demonstrate the possibility of shielding political expression and activity from the coercive undertones of the benevolent state. Here, the Court has drawn the balance more successfully. It has used the unconstitutional conditions doctrine to protect the rights of political speakers to speak their minds without being cut off from the benefits of the modern state. If the Court has erred, it has perhaps underestimated the importance of protecting individuals from compulsory support of the political advocacy of others.

In this article, I have attempted to bring together these reli-

gious and political doctrines. I believe the common core of principle to be similar in the two contexts. The principal advantage of considering religion and politics together, aside from the fact that they are so similar, is that modern ideologies tend to focus on only one part of the evil. The persons who are alarmed at use of federal funds to lobby against budget cutbacks are not, by and large, the same persons who object to subsidies for religious activities. The effect of considering these two areas together is that each can serve as a corrective to the excesses or deficiencies of the doctrine pertaining to the other. If we treat religious and political speech consistently, the likely consequence is that biases for or against religion, or for or against political lobbying, will be reduced and perhaps neutralized. The result should be a sounder view of government aid to both politics and religion.