

**THE CONSTITUTIONALITY OF FAITH-BASED PRISON
UNITS:ARTICLE:COORDINATING THE EXERCISE AND ESTABLISHMENT
CLAUSES: A NARROW ESTABLISHMENT CLAUSE TEST FOR
GOVERNMENT FUNDING OF PRISONER REHABILITATION SERVICES BY
RELIGIOUS PROVIDERS**

Spring, 2008

Reporter

6 Ave Maria L. Rev. 387 *

Length: 23524 words

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Text

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Introduction

Any time religious organizations interact with government, there looms the potential application of the Establishment Clause. ¹ Its invocation becomes a near certainty whenever public funds pass to religious institutions. ² But this is where the certainty ends, because the Court's Establishment Clause jurisprudence has become mired in a web of confusing and contradictory rules. ³ The Court has been unable to settle on any one test or model, even in cases that present similar facts. ⁴ As one scholar has noted, "The Supreme Court's **[*388]** Establishment Clause jurisprudence is a mess - both hopelessly confused and deeply contradictory." ⁵ Because of

¹ [U.S. Const. amend. I](#), cl. 1 ("Congress shall make no law respecting an establishment of religion ...").

² See, e.g., [Zelman v. Simmons-Harris](#), [536 U.S. 639, 648, 662-63 \(2002\)](#) (rejecting an Establishment Clause challenge to a publicly funded voucher program that parents could use in either religious or secular schools); [Bowen v. Kendrick](#), [487 U.S. 589, 593 \(1988\)](#) (upholding a government program that funded both religious and secular non-profit organizations providing adolescent pregnancy prevention services against an Establishment Clause challenge).

³ For a discussion of the array of confusing and contradictory Establishment Clause tests used by the Court, see Patrick M. Garry, *Wrestling with God: The Courts' Tortuous Treatment of Religion* 55-57 (2006) [hereinafter Garry, *Wrestling with God*]; see also Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, [37 Cumb. L. Rev. 1, 7-16 \(2006\)](#) [hereinafter Garry, *A Congressional Attempt*].

⁴ Compare *McCreary County v. ACLU of Ky.*, [545 U.S. 844, 850, 859, 874, 881 \(2005\)](#) (using the purpose test to uphold a preliminary injunction against a Ten Commandments display in a public courthouse), with [Van Orden v. Perry](#), [545 U.S. 677, 686 \(2005\)](#) (plurality opinion) (using the historical traditions test to uphold the display of a Ten Commandments monument on public grounds). See generally Garry, *A Congressional Attempt*, supra note 3, at 2-4 (comparing the conflicting results of *McCreary County* and *Van Orden*).

how the Establishment Clause has been applied, it has often created a dissenter's right, which has served to restrict religious freedom just as a heckler's veto can serve to restrict free speech rights.⁶

One controversy under the Establishment Clause is whether government can contract with religious organizations on the same terms as it can with secular organizations for certain social welfare services.⁷ This Article will attempt to offer a more simplified and narrowly focused Establishment Clause test, focusing particularly on government funding or accommodation of religious organizations performing social welfare work in prisons.⁸ In articulating this model, [*389] the Article will elaborate on the Establishment Clause model put forth in *Wrestling with God*.⁹ The model relies on a cooperative and coordinated relationship between the Free Exercise Clause¹⁰ and the Establishment Clause.¹¹ By narrowing the application of the latter, the [*390] model in turn expands the reach of

⁵ Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, [8 U. Pa. J. Const. L. 725, 725 \(2006\)](#). Specifically, Steven Gey writes:

Current Establishment Clause doctrine and theory is a hopeless muddle at every level of analysis. From a doctrinal standpoint, the modern Court's approach to the Establishment Clause fails to meet even the most mundane requirement of doctrinal clarity. From a theoretical standpoint, the Court has failed to achieve even a rudimentary level of consistency in its First Amendment pronouncements regarding church and state... . At one point or another in recent years, one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause.

Id. at 728.

⁶ See Patrick M. Garry, *Liberty from On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty*, [95 Ky. L.J. 385, 392 \(2007\)](#).

⁷ For examples of cases allowing such contracting, see [Zelman, 536 U.S. at 662-63](#), and [Bowen, 487 U.S. at 593](#). But see [Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 954-55 \(W.D. Wis. 2002\)](#) (holding that direct, unrestricted government funding of an organization that engaged in religious indoctrination while providing drug and alcohol addiction recovery services violated the Establishment Clause). Compare id., with [DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 401-02 \(2d Cir. 2001\)](#) (finding no Establishment Clause violation for government funding to a private alcoholic treatment facility that included in its program Alcoholics Anonymous ("A.A.") sessions, as long as "the facility's staff neither coerces clients to attend such sessions nor itself indoctrinates clients in A.A. principles," and remanding the case to the district court to determine whether the facility's staff did indeed "inculcate clients in A.A. doctrine").

⁸ For a general discussion on government funding of religious organizations involved in prison programs, see Tim Eicher, *Scaling the Wall: Faith-Based Prison Programs and the Establishment Clause*, [5 Geo. J.L. & Pub. Pol'y 221 \(2007\)](#). For a discussion of other examples of publicly funded religious organizations involved in social welfare work, see Brian C. Ryckman, *Comment, Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, [9 U. Pa. J. Const. L. 929 \(2007\)](#). Because of the age-old tradition of religious organizations getting involved in social welfare work (indeed, an involvement which extends long beyond the federal government's involvement), the country's dependence on these organizations has "led to an environment in which the dividing line between public and private disaster relief [is] often quite blurred." Id. at 931.

⁹ Garry, *Wrestling with God*, supra note 3, at 128-46.

¹⁰ [U.S. Const. amend. I](#), cl. 2 ("Congress shall make no law ... prohibiting the free exercise [of religion].").

¹¹ This relationship between the Free Exercise Clause and the Establishment Clause can be expressed as follows:

The free-exercise clause defines a fundamental individual liberty and articulates what the framers saw as a natural right. The establishment clause, on the other hand, simply provides a negative check on certain governmental actions; it addresses what the framers perceived from their experience with England as one of the gravest threats posed to religious liberty by a centralized government. As such, the establishment clause plays a supporting role to the exercise clause.

...

the former. Thus, when determining whether government aid to or accommodation of religious groups performing social welfare work in prisons violates the Establishment Clause, the focus should only be at one level: the level at which the government is choosing funding beneficiaries. Any concern about how the program functions regarding the actual program beneficiaries becomes a matter for the Free Exercise Clause.

Part I of this Article examines the constitutional role and purpose of the Establishment Clause. The history surrounding the debates and ratification of the First Amendment strongly suggests that the Establishment Clause works in tandem with the Free Exercise Clause to protect religious liberty, with the Establishment Clause focusing on the institutional aspect of religious liberty. As such, the Establishment Clause does not prevent government from giving aid to religious institutions, as long as that aid does not discriminate in form or against any particular institution.

After examining the general role and purpose of the Establishment Clause, Part II of the Article sets out a new model for determining the constitutionality of government funding programs in which religious organizations participate. This test seeks to simplify Establishment Clause jurisprudence, as well as accommodate the historic role that religion has played in the nation's social welfare system.

I. The Establishment Clause Seeks to Protect the Institutional Autonomy of Religious Organizations

A. The Narrow Focus on Institutional Autonomy

One view of the Establishment Clause, persuasively articulated by Professor Steven Smith, is that the clause is jurisdictional and has no substantive meaning at all.¹² In this respect, the Establishment Clause [*391] has been

Contrary to current notions, the establishment clause does not act as a kind of veto or check on the exercise clause. Instead, given the primacy of the exercise clause in the First Amendment hierarchy, the establishment clause occupies a subordinate position. It elaborates on the exercise clause; it makes specific reference to one particular protection granted to religious liberty. Consequently, the establishment clause can never properly negate or counteract the exercise clause - it can apply only in a specific subset of religious freedom cases in which the applicability of the exercise clause may not be discernable... .

... .

... An establishment of religion occurs only when the government has involved itself, in a permanent or ongoing way, within the institutional integrity of an existing or created religious denomination. Consequently, the establishment clause applies only on an institutional level, governing the relationship between governmental entities and religious organizations. And because of this narrow scope, it is the exercise clause that should actually cover many of the controversies currently being decided under the establishment clause.

... .

Under this view of the First Amendment, nearly all of the religious expression cases of the past sixty years ... should have been decided under the exercise clause, not the establishment clause.

Garry, *Wrestling with God*, supra note 3, at 131-33, 136 (footnotes omitted). Some judges and scholars, however, take a broad view of the Establishment Clause, using it to strike down any governmental interaction with or acknowledgment of religion - essentially using the Establishment Clause to create a wall of separation between church and state. This creates a perceived conflict between the Establishment and Free Exercise Clauses, with the latter granting protections for religion and the former granting protections from religion. See *id.* at 44-54. These separationists view the Establishment Clause as "protecting a secular society and keeping the public presence of religion in check. Thus, whenever a perceived conflict arises between the establishment clause and the exercise clause, they give priority to the former and make every presumption in favor of limiting the public role of religion." *Id.* at 143.

¹² Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17 (1995); cf. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, [37 Case W. Res. L. Rev. 674, 678 \(1987\)](#) (stating that there was never any intended "constitutional philosophy" for the interaction of church and state). According to Professor Steven Smith:

interpreted as having a federalism component, insofar as it provides a "constitutional promise to the states that the federal government would not interfere with certain forms of state religion policy."¹³ This is the view Justice Thomas has adopted, leading him to argue that the Establishment Clause never should have been applied to the states by way of incorporation through the Fourteenth Amendment.¹⁴

Although the jurisdictional view of the First Amendment is powerfully persuasive, it is not the view taken here, especially since the adoption of that view would require that the Supreme Court do the extremely unlikely: reverse itself on the issue of incorporation.¹⁵ [*392] Instead, this Article will assert that the Establishment Clause does have a substantive, though narrow, meaning.¹⁶ This substantive meaning provides a particular command that the

The Framers of the Establishment Clause did not intend to adopt any particular right or principle of religious freedom, but rather intended simply to reconfirm in writing the jurisdictional arrangement that preexisted the Constitution and that no one wanted to alter: this was an arrangement in which religion was a subject within the domain of the states, not the national government.

Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, [81 Notre Dame L. Rev. 1843, 1843 \(2006\)](#). This jurisdictional interpretation "holds that the core purpose of the Establishment Clause was to confirm that jurisdiction over religion - or at least over the central concerns of religious establishment and free exercise of religion - would remain with the states." *Id.* at 1870. As Professor Smith also recognizes, however, now that the Establishment Clause has been incorporated through the Fourteenth Amendment, "a return to the federalist jurisdictional arrangement for religion that the First Amendment originally contemplated is not only undesirable, but impossible. It simply is not going to happen." *Id.* at 1892. For another view of the jurisdictional interpretation of the Establishment Clause, arguing that the First Amendment language "shall make no law" constitutes a jurisdictional clause insofar as it is a denial of power, see Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 *Harv. J.L. & Pub. Pol'y* 111, 115-16 (1993).

¹³ Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, [56 Emory L.J. 19, 43 \(2006\)](#) (noting the argument that the First Amendment did not create a national religion policy, but simply left the whole matter to the states).

¹⁴ See [Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45, 49 \(2004\)](#) (Thomas, J., concurring in the judgment) (proposing a federalist construction of the Establishment Clause). Such a federalist view is necessary, according to Professor Munoz, because "the Founders did not share a uniform understanding of the proper relationship between church and state," and the Establishment Clause was drafted to quell concerns that the new federal government would "impose one form of church-state relations throughout the nation." Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, [8 U. Pa. J. Const. L. 585, 604 \(2006\)](#).

As a consequence of viewing the Establishment Clause as a structural or federalism provision, rather than one that protects individual rights, Professor Akhil Amar concludes that the Establishment Clause should not have been incorporated through the Fourteenth Amendment to apply to the states. Akhil Reed Amar, *The Bill of Rights As a Constitution*, [100 Yale L.J. 1131, 1157-60 \(1991\)](#); Akhil Reed Amar, *Some Notes on the Establishment Clause*, [2 Roger Williams U. L. Rev. 1, 3-4 \(1996\)](#); see also Munoz, *supra*, at 631 (arguing that because the Establishment Clause did not constitutionalize a personal right of non-establishment it should not have been incorporated).

¹⁵ The jurisdictional view would hold that the Establishment Clause does not apply to the states. The Court, on the other hand, has held that the Establishment Clause does apply to the states by incorporation through the [Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1, 15-16 \(1947\)](#) (asserting that the Establishment Clause erects "a wall of separation between church and state" that applies on both state and federal levels).

¹⁶ Supporting the argument that the Establishment Clause can only have a narrow substantive meaning, and not the sweeping "wall of separation" meaning given in *Everson*, historians like Philip Hamburger and Daniel Dreisbach have found that many of the Founders held differing, even conflicting understandings of church-state relations. See Philip Hamburger, *Separation of Church and State* 1-9 (2002) (questioning Thomas Jefferson's true purpose in using that phrase); Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 *Am. J. Legal Hist.* 172, 172-74 (1991) (detailing the difference in opinion of our Founding Fathers regarding Virginia's separation of church and state).

The confusing, historically contradictory course of establishment doctrine in the twentieth century began with the decision in *Everson*, which was the Court's first formal foray into what would become a jungle of Establishment Clause jurisprudence. In

national government refrain from doing certain things that amount to establishing a religion. But this substantive meaning is narrow by necessity, since the Framers' views of establishment were narrowly focused on preventing an American version of the Church of England. ¹⁷ Their views were definitely not as sweeping as those of the current advocates of a wall of separation between church and state, and definitely did not include the Establishment Clause banning any government recognition of religion and religious speech. ¹⁸

B. The Relationship Between the Exercise and Establishment Clauses

During the constitutional period, the impetus for the Establishment Clause grew out of the same concern that led to the **[*393]** Free Exercise Clause. ¹⁹ As Professor Feldman has argued, both clauses were intended to protect the freedom of religious worship and the right to exercise one's religious beliefs. ²⁰ To the Founders, religious liberty inspired the First Amendment: the Establishment Clause, in a concern for religious liberty, dictated clear and protected institutional boundaries between the state and religion. ²¹ Indeed, the debates over the First Amendment religion clauses at the state ratifying conventions focused on protecting religious liberty and guaranteeing equality among religious sects. ²² This means that the two clauses are not in tension - contrary to the position taken by the separationists that the Establishment Clause (a protection from religion) counteracts the Free Exercise Clause (a protection for religion). ²³

upholding the constitutionality of a program that allowed parents to be reimbursed for the costs of transporting their children to and from parochial schools, the Court gave its view of the Establishment Clause: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'" [Everson, 330 U.S. at 3, 15-18](#). It was the last sentence of this long quote that has proved to be the curse of Establishment Clause jurisprudence over the past half-century, since it was anything but indicative of the Framers' true intentions regarding the religion clauses of the First Amendment.

¹⁷ See, e.g., [Walz v. Tax Comm'n, 397 U.S. 664, 668 \(1970\)](#) ("For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

¹⁸ See Garry, *Wrestling with God*, supra note 3, at 87-88. Religious ideas had infused early American political philosophies - religious ideas had inspired the Declaration of Independence and had laid the foundations of American constitutional democracy; the Framers, therefore, had no desire or intention for the Establishment Clause to be some kind of protection against religion and in favor of a secular society. *Id.*

¹⁹ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, [77 N.Y.U. L. Rev. 346, 381 \(2002\)](#) (describing that the idea of "liberty of conscience" informed debates of both religion clauses).

²⁰ See *id.* at 381-84, 398-402.

²¹ Noah Feldman, *Divided by God: America's Church-State Problem - And What We Should Do About It* 52 (2005). According to Feldman, the impetus behind the religion clauses "was to protect the liberty of conscience." *Id.* at 20. But religious liberty, and certainly the liberty to join and function within a religious organization, would be restricted if government intruded into that organization or if government gave preferential treatment to some other religious organization. See *id.* at 52. The Establishment Clause was not focused on forbidding "public religious symbolism" so as to prevent offending secular society. *Id.* at 50-51. As Feldman argues, the First Amendment served to separate the institutions of government and religion, not to separate religion from public life. See *id.* at 52.

²² Steven K. Green, *A "Spacious Conception": Separationism As an Idea*, [85 Or. L. Rev. 443, 469-70 \(2006\)](#). Moreover, Professor Derek Davis, in his study of the Continental Congress, recognizes that the focus or nature of Congress's religious activity "operated almost exclusively within an accommodationist paradigm." Derek H. Davis, *Religion and the Continental Congress 1774-1789*, at 227 (2000).

²³ Robert G. Natelson, *The Original Meaning of the Establishment Clause*, [14 Wm. & Mary Bill Rts. J. 73, 89-90 \(2005\)](#) (arguing that since the Establishment Clause exists to serve the Free Exercise Clause, "then in the event of conflict, the former must yield"). For a discussion on the unitary or harmonious relationship between the two religion clauses, see Garry, *Wrestling with God*, supra note 3, at 129-31; Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, [2004 Utah L. Rev. 1155, 1158-60](#).

Given that both clauses protect religious liberty, the question is what differentiates the two clauses in the way they protect that liberty. As outlined in *Wrestling with God*, the Free Exercise Clause protects individual freedom, while the Establishment Clause protects the institutional autonomy of religious organizations.²⁴ The most [*394] obvious way in which this institutional protection applies is through a kind of equal protection application. Significant historical research supports the notion that the Establishment Clause requires not that the government refrain from any aid to or recognition of religion, but rather that when doing so it treat all religious sects the same and not give preferential treatment to any select sect.²⁵ This equal protection aspect was "designed to buttress free exercise by requiring the federal [*395] government, to the extent its legislation touched religion, to treat all faiths in a non-discriminatory manner."²⁶

²⁴ Garry, *Wrestling with God*, supra note 3, at 134. This individual-institutional distinction can also be seen in some of the Court's decisions regarding the constitutionality of government aid, in which the Court has been more likely to uphold public aid to an individual who uses the money for religious purposes than it is to uphold aid given to religious institutions engaged in religious activities, and in the way the notion of entanglement is applied only to institutions under the Establishment Clause. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, [47 Vill. L. Rev. 37, 81-82 \(2002\)](#).

In his survey of establishments in England and the colonies during the pre-constitutional period, Judge Michael McConnell lists six basic characteristics or elements of an established religion: governmental control over the doctrines and structure of the state religion; mandatory public membership in the state religion; governmental financial support of the state religion; a restriction on any other religions; the involvement of the state religion in civil affairs; and limiting political participation to members of the state religion. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, [44 Wm. & Mary L. Rev. 2105, 2131 \(2003\)](#). But each of these elements of establishment relates to institutional aspects of religions.

By protecting religious institutional autonomy, the Establishment Clause may be interpreted to provide protection against certain tort liability that may threaten the financial or religious independence of the sect. See Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, [3 Geo. J.L. & Pub. Pol'y 387, 427-45 \(2005\)](#) (discussing protection from certain breach of fiduciary duty claims against a church or minister); Douglas Laycock, *A Syllabus of Errors*, [105 Mich. L. Rev. 1169, 1178-81 \(2007\)](#) (book review) (differentiating between allegations of negligence, which would require state interference in church policies, and knowing failure to supervise, which only require inquiry into what church officials actually knew). A comprehensive discussion of the effects of tort claims on religious institutions appears in Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, [2004 BYU L. Rev. 1789](#). These tort claims are brought against the institution and are based on behavior engaged in by individuals associated with the ministerial mission of the sect - such as claims of sexual misconduct against individual priests. Although such claims are usually evaluated under the Free Exercise Clause, Professors Lupu and Tuttle examine them under the Establishment Clause. *Id.* at 1796 (examining whether the Establishment Clause limits governmental jurisdiction over issues involving the selection and training of a religious sect's leaders). As Lupu and Tuttle argue, constitutional doctrine protects a religious organization's right to select and supervise the spokespersons for its faith. *Id.* at 1796, 1809. "The Establishment Clause forbids a state from using the civil law to impose a normative vision of the structure of religious organizations," which frequently have "idiosyncratic and complex organizational forms." *Id.* at 1844, 1869.

²⁵ See Natelson, supra note 23, at 124-25 (stating that during the constitutional period, establishment was thought to mean some "mechanism whereby one denomination or group of denominations was favored over others"). The Founders believed that, although the clause allowed the government to favor religion over nonreligion, it prohibited any discrimination among religious sects. *Id.* at 135 (stating that this can explain "why the same houses of Congress that adopted the Establishment Clause saw no inconsistency in hiring chaplains to offer prayers or in resolving to reserve a day of public thanksgiving and prayer" (internal quotation marks omitted) (footnote omitted)).

²⁶ *Id.* at 138 (noting that the Establishment Clause extended no protection to the irreligious, since "those who did not believe in God did not have a 'religion' within the meaning of the First Amendment and had no standing under that Amendment"). As Justice Rehnquist stated in his dissent in *Wallace v. Jaffree*, Madison, who proposed the First Amendment, intended for the Establishment Clause only "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion." [Wallace v. Jaffree](#), [472 U.S. 38, 98-99 \(1985\)](#) (Rehnquist, J., dissenting).

The Establishment Clause has an institutional focus, protecting the autonomy of religious institutions.²⁷ It does not reflect a mistrust of religion, nor does it serve to protect a secular society from the influence and presence of religion as various justices and commentators have advocated, but rather it serves to protect religious institutions from intrusive or discriminatory treatment by the government.²⁸ It protects against the government improperly involving itself in the functions, powers, or identity of a religious organization.²⁹ The Establishment Clause aims to keep a religious institution as free as possible to pursue its chosen mission.³⁰ This interpretation is much narrower than the separationist theory espoused in cases adhering to a "wall of separation" approach, which uses the clause to essentially mandate a radical transformation of American society in which religion is separated from civil society, and to redefine society along strictly secular lines.³¹

C. An Improper Establishment Requires More Than a Momentary Interaction Between Government and Religion

Another element of the Establishment Clause model set forth in *Wrestling with God* is that an improper establishment of religion, by the very definition of the word "establishment," requires something [*396] more than a transitory or isolated association between government and a particular religious sect.³² There must be something "established," something evidencing a long-term institutional association between the state and a religion. For instance, if a Jewish group erects a menorah display over Hanukkah on the courthouse grounds, such an act can hardly be said to constitute an establishment, since it is of a transitory nature and shows no evidence of there being any permanent relationship between the state and the Jewish religion.³³

In connection with this view of establishment as a long-standing associational involvement between the government and a religion, any particular government-religion interaction should not be viewed in isolation - it should not be viewed as single-handedly defining the nature of the state's overall policy and intent with regard to that religion.³⁴ This is one of the faults of the endorsement test.³⁵ According to that test, a reasonable observer could conclude,

²⁷ See Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 *J.L. & Religion* 153, 168, 178 (2006) (arguing that "[a] broad right of autonomy for religious groups" is necessary to protect the ability of "religious communities to generate and communicate new and progressive ideas for civic and social life," and that "religious group autonomy is essential to support robust freedom of belief").

²⁸ For a discussion of the view that the Establishment Clause serves to protect a secular society from the political divisiveness that religion can cause, see Richard W. Garnett, *Religion, Division, and the First Amendment*, [94 *Geo. L.J.* 1667 \(2006\)](#).

²⁹ See Carl H. Esbeck, *The Establishment Clause As a Structural Restraint on Governmental Power*, [84 *Iowa L. Rev.* 1, 44-45 \(1998\)](#).

³⁰ See Garry, *Wrestling with God*, *supra* note 3, at 134, 140.

³¹ See *id.* at 45-52.

³² [Id. at 133](#).

³³ This is another reason why the Establishment Clause should not apply to religious speech or displays on public property, leaving only the Free Exercise Clause to govern. Garry, *Wrestling with God*, *supra* note 3, at 135-37. If a religious group is awarded a one-time, short-term public grant to conduct a social welfare program inside one of the state's prisons for a period of six months, this temporary government-religion association should not by itself lead to any presumption of an improper establishment. Indeed, the presumption should be that transitory associations do not amount to establishments, and that it is the burden of the challengers to prove that those associations do in fact rise to the level of an intentional, long-standing, discriminatory alignment between the state and a particular religious sect.

³⁴ An establishment of religion cannot be determined simply by looking at one instance of government-religion interaction in isolation. Because one Hindu group, for example, is providing social welfare services at one prison in a state, unless the state has improperly preferred that group to any other group, the one-time service should not by itself be sufficient to show an establishment. Nonetheless, there still might be Free Exercise Clause issues.

after one viewing of a Christmas creche display on public grounds, that in fact the government had aligned itself with the Christian religion in a way that amounted to an improper establishment of religion.³⁶ But how reasonable could that person be if that one, momentary experience would lead to such a conclusion? Should not a reasonable person be held to the duty of looking around to see if other indications of this suspected establishment exist? Conversely, should not a reasonable person be charged with the responsibility of [*397] perceiving the obvious existence of other factors that might negate any conclusion of establishment?

D. The Court's Wrong Turn in Its Establishment Clause Jurisprudence

The requirement of a longer-term association of government and religion, extended beyond some isolated incident of government-religion interaction, will correct a wrong turn the Court made early on in its Establishment Clause jurisprudence. In *Engel v. Vitale*³⁷ and *Abington School District v. Schempp*,³⁸ the Court based its decision on Establishment Clause grounds rather than on Free Exercise grounds, even though the statutes in both cases required the recitation of prayer in public schools, hence directly affecting the free exercise rights of the students.³⁹ But instead of treating mandated school prayer as a possible Free Exercise violation requiring governmental coercion, the Court decided to treat even voluntary, non-denominational prayer as an Establishment Clause violation, which in turn did not require any showing of governmental coercion.⁴⁰ Perhaps this approach was taken because the Court simply wanted to banish prayer from the schools without having to inquire whether the state was coercing anyone.

Because of the direction the Court took in *Engel* and *Schempp*, the Establishment Clause was divorced from any connection with religious liberty. Not only was there no governmental coercion required, but the First Amendment doctrines were structured so as to create a "separation" between church and state. Justice Thomas would end that misapplication by imposing an "actual legal coercion test," which would nullify government sponsorship of religious speech only if that sponsorship resulted in the actual legal coercion of [*398] someone.⁴¹ According to the theory

³⁵ For a discussion and criticism of the endorsement test, see Garry, *Wrestling with God*, supra note 3, at 57-68.

³⁶ This was, in fact, the conclusion reached in [County of Allegheny v. ACLU, 492 U.S. 573, 621 \(1989\)](#).

³⁷ [370 U.S. 421 \(1962\)](#).

³⁸ [374 U.S. 203 \(1963\)](#).

³⁹ [Id. at 223](#); [Engel, 370 U.S. at 424](#). *Engel* involved a requirement that students recite a prayer at the start of the school day, [id. at 422](#), while *Schempp* involved a required Bible reading and prayer recitation, [Schempp, 374 U.S. at 207](#).

⁴⁰ In *Schempp*, the Court acknowledged that Free Exercise claims require the challenger to show proof of governmental coercion, while Establishment Clause claims need no such showing. [Schempp, 374 U.S. at 223](#). In *Engel*, Justice Black stated that even if the prayer was nondenominational and voluntary it would still violate the Establishment Clause, although the same considerations might render the prayer constitutional under the [Free Exercise Clause. Engel, 370 U.S. at 430](#).

⁴¹ See [Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 \(2004\)](#) (Thomas, J., concurring in the judgment). Under Justice Thomas's proposed test, a violation of the Establishment Clause only occurs when the government authority is used to coerce religious beliefs. *Id.* Examples of such coercion are mandatory church attendance or government taxation for the purpose of financing a particular religion. *Id.* Moreover, coercion is inherent whenever government gives preference to one particular religion. See *id.* Justice Thomas later reiterated that legal coercion should be the true Establishment Clause test. [Van Orden v. Perry, 545 U.S. 677, 693 \(2005\)](#) (Thomas, J., concurring) ("Our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment necessarily [to] involve actual legal coercion." (alteration in original) (internal quotation marks omitted)).

Under current Establishment Clause jurisprudence, there are very few cases in which actual legal coercion can be found. In most of these cases, the issue is not about a citizen who simply wants to be free from government compulsion or punishment. Instead, it is about individuals who want to restrain government from doing something with which the individual disagrees.

set forth in *Wrestling with God*, however, such public sponsorship of religious expression does not even present an Establishment Clause issue.⁴² First, it does not involve government action that infringes upon the institutional autonomy of any religious organization.⁴³ And second, it is more adequately addressed by the Free Exercise Clause, which is most primarily concerned with government coercion of the religious beliefs and practices of individuals.⁴⁴

The problem with Justice Thomas's legal coercion test is that it basically mirrors the Free Exercise Clause, rendering the Establishment Clause redundant. The *Wrestling with God* model, however, focuses on institutional autonomy and long-term governmental associations with preferred religions, and hence applies in those cases in which individual coercion might not be readily [*399] ascertainable.⁴⁵ Under this view of the Establishment Clause, the first and foremost concern is with the freedom and integrity of the institution and not the individual, whose protection comes mainly from the Free Exercise Clause.⁴⁶ The Establishment Clause applies where a historic precondition for the assault on religious liberty is occurring.⁴⁷ For instance, if the government enacts a policy in which religious buildings more than one hundred years old shall not be subject to building code regulations, it might not be readily apparent at first how that policy could affect anyone's religious liberty; likewise, perhaps the fact that a government grant is given to a selected religious denomination does not appear at first to exert any coercive effect on anyone. Under the *Wrestling with God* test, however, both policies could be suspect because in the former case the government could be favoring older religions over newer ones and in the latter the government would be favoring the selected religious sect over others.

Because the Establishment Clause is a narrower clause than the Free Exercise Clause,⁴⁸ and is aimed at protecting the institutional autonomy of religious organizations, it is not some grand constitutional command that tries to separate religion from the nation's civic life. It is not a protector of secular society, nor does it act to shield people from the controversial and challenging views of religion.⁴⁹ Thus, the Establishment Clause, contrary to the

Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 *First Amendment L. Rev.* 162, 174-75 (2006). Nevertheless, as Professors Lupu and Tuttle note, "Government promotion of religious messages and symbols is the sole area of religion clause concern in which the Supreme Court arguably has expanded, rather than narrowed, the reach of the Establishment Clause." Lupu & Tuttle, *supra* note 13, at 55.

⁴² See Garry, *Wrestling with God*, *supra* note 3, at 135-37. The Establishment Clause seeks to protect religious institutional autonomy, not to forbid the government from sponsoring or accommodating religious expression that carries no legal coercion. See Christal L. Hoo, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 *Penn St. L. Rev.* 683, 698 (2004) (stating that the "history of the Religion Clauses dispels any notion that government is forbidden from affirming, through language or symbol, the special status of religion in public life").

⁴³ Garry, *Wrestling with God*, *supra* note 3, at 134-35.

⁴⁴ *Id.*

⁴⁵ This model essentially assumes that any governmental preferential treatment of one religion will result in coercion to the non-favored religions. See *id.*

⁴⁶ [Id. at 134.](#)

⁴⁷ During the constitutional period, the establishment of a national religion was seen as a precursor to the deprivation of religious liberty. See [id. at 94-95.](#)

⁴⁸ For a discussion on the primacy of the Free Exercise Clause, see Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 *Fla. L. Rev.* 1, 42-44 (2005).

⁴⁹ Several decades ago, when the Court was more firmly committed to a separationist stance, the separationist fear was one of the threat of government capture by a religion or religions. See Calvin Massey, *The Political Marketplace of Religion*, 57

suggestion in *Everson v. Board of Education*, does not try to counteract history and create some grandiose wall of separation between civil society and religion.

[*400]

II. A Proposed Establishment Clause Test for Instances of Public Aid to Religion

When individual religious coercion is present, the Free Exercise Clause comes into play. The Free Exercise Clause is the broader of the religion clauses.⁵⁰ But the Establishment Clause comes into play when religious institutions are involved and when government interactions may intrude upon the autonomy of those institutions and violate equal protection for different religious sects, even though such interactions may not immediately appear to be coercive to the individual.⁵¹ In these cases, such as when government provides funding to religious organizations for certain purposes like prison social welfare work, the courts should apply a two-part test.⁵² First, the funding can only go to support the secular function being performed.⁵³ Second, measured at the time when government makes its funding decision, the choice must be made on nonreligious or religiously neutral grounds.⁵⁴ In other words, one religion cannot be favored over another, and a religious organization cannot be favored over a nonreligious one just because it is religious. Nevertheless, a religious organization cannot be penalized just because of its religious identity. If it serves the secular goal set by the state,⁵⁵ then its religious identity is of no constitutional importance.

[*401]

A. The Secular Function Requirement

The secular function prong in the proposed test differs from the purpose test used in *McCreary County v. ACLU of Kentucky*, in which the Court looked for the presence of any religious purpose behind a Ten Commandments display in a county courthouse.⁵⁶ In the proposed test, the focus would not be on the more subjective issue of

[Hastings L.J. 1, 13 \(2005\)](#). But later, as that threat seemed increasingly unlikely, the focus of the separationists turned more to a desire to protect society from the social divisiveness caused by religious beliefs.

⁵⁰ Garry, *supra* note 23, at 1163-64.

⁵¹ Garry, *Wrestling with God*, *supra* note 3, at 134-35. The Establishment Clause seeks to protect religious liberty by guarding the institutional autonomy of religious organizations; it does not seek to protect secular society from the influences of religious organizations. See [id. at 134, 144-46](#).

⁵² This proposed test is gleaned from, and reinforced by, various judicial decisions. See *infra* Part II.C.

⁵³ See [Mitchell v. Helms, 530 U.S. 793, 820-22 \(2000\)](#) (plurality opinion) (stating that aid provided to religious schools must not be of a religious nature, but rather the same type of aid that could be provided to secular schools); [Bowen v. Kendrick, 487 U.S. 589, 612 \(1988\)](#) (stating that there must not be an unacceptable risk that the religious institution will use the government aid to advance their religious mission, but allowing those institutions aid to perform their secular functions).

⁵⁴ In *Bowen*, the Court held that a government social welfare program that provided funds to religious organizations was not unconstitutional because it had a secular purpose and was neutral toward the religious or secular status of the program grantees. See [Bowen, 487 U.S. at 602-03, 608](#); cf. [Mitchell, 530 U.S. at 809-10](#) (plurality opinion) (emphasizing the principle of neutrality).

⁵⁵ These goals can involve such matters as individual character and social values, as long as they are not tied to a specific religious denomination.

⁵⁶ See *McCreary County v. ACLU of Ky.*, [545 U.S. 844, 881 \(2005\)](#). On the surface, the Court claimed that it was using a prong of the Lemon test - such as the requirement of a valid secular purpose - but the Court's real focus was not on whether the display possessed a secular purpose. [Id. at 859](#). Indeed, the Ten Commandments was just one of the documents in a display that included the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, and

government purpose or intent.⁵⁷ Instead, it would go to function; it would look only to what function the government is seeking to serve by contracting with the religious organization. If it is a religious function - for example, the religious instruction or training of prisoners - then the program would violate the Establishment Clause, since government financing of religious instruction inherently involves a preference of some religions over others.⁵⁸ Nonetheless, if the focus of the proposed funding is a secular function - for example, [*402] the education and counseling of prisoners to guide them away from a life of crime and to help them become peaceful, well-adjusted members of civil society - then part one of the test is met. The focus on function versus purpose or intent will bring about a greater certainty and objectivity in the Court's Establishment Clause jurisprudence.

B. The Neutrality Requirement

The second prong of the proposed test requires that the choice as to whether government will fund a particular organization carrying out a secular function must be made on nonreligious grounds.⁵⁹ Thus, religion must not enter into the choice as to whether to publicly fund an organization performing a secular function. But the constitutionally relevant choice is that which exists at the time of the funding decision.⁶⁰ The Court acknowledged

the National Motto. *Id.* at 856. The Court inquired whether McCreary County had ever shown a religious purpose in displaying the Ten Commandments - a purpose that would carry through despite the more than sufficient secular nature of the display at issue. See [id. at 868-74](#).

Prior to McCreary, the purpose prong of the Lemon test simply demanded the existence of a secular purpose. See [Lynch v. Donnelly, 465 U.S. 668, 680 \(1984\)](#) (requiring a wholly religious motivation before finding lack of secular purpose). But as Justice Scalia argued, McCreary effected a significant transformation in the purpose prong:

By shifting the focus of Lemon's purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

[McCreary, 545 U.S. at 902-03](#) (Scalia, J., dissenting) (footnote omitted).

⁵⁷ Justice Scalia has also criticized the effort to examine governmental purpose: "The number of possible motivations, to begin with, is not binary, or indeed even finite... . To look for the sole purpose of even a single legislator is probably to look for something that does not exist." [Edwards v. Aguillard, 482 U.S. 578, 636-37 \(1987\)](#) (Scalia, J., dissenting).

⁵⁸ Under current law, the public funding of religious activities is prohibited. In *Mitchell*, for instance, Justice O'Connor stressed that public funds could only be used for secular activities. See [Mitchell, 530 U.S. at 837-44 \(2000\)](#) (O'Connor, J., concurring). In *Bowen*, the Court stated that it would strike down any government funding that "would be used to 'advance the religious mission' of the religious institution receiving aid." [Bowen, 487 U.S. at 612](#) (quoting [Meek v. Pittenger, 421 U.S. 349, 370 \(1975\)](#), overruled by [Mitchell, 530 U.S. at 808](#)).

⁵⁹ For this prong to be violated, a preference for religious providers has to be built into the system. It cannot be result-oriented - for example, the fact that more religious providers are awarded funds than are nonreligious providers is not sufficient to render the program unconstitutional. For instance, Judge Posner recognized that any requirement on government to ensure the existence, in an indirect grant system, of secular providers offering similar services of equal quality to those offered by religious providers would result in a "race to the bottom" in which secular providers would reduce the quality of their programs so as to put superior-quality religious providers out of the running. [Freedom From Religion Found., Inc. v. McCallum, 324 F.3d 880, 884 \(7th Cir. 2003\)](#).

⁶⁰ This choice differs from the type of choice that seemed to help sustain the voucher program in [Zelman v. Simmons-Harris, 536 U.S. 639 \(2002\)](#). There, the decision of where to spend the vouchers - for example, at a religious school - was seen as a private choice made by parents, and this private choice severed any connection between the government aid and the religious school. [Id. at 662-63](#). But this choice is a beneficiary choice, a decision made by those members of the public taking advantage of the publicly funded program being administered by the religious organization. It does not relate to the level of choice discussed in this Article - the very initial choice of the government regarding design of the program and to whom and how the

the importance of this level of choice in *Bowen v. Kendrick*, where it upheld the Adolescent Family Life Act, finding that under the Act "a fairly wide spectrum of organizations [was] eligible to ... receive funding ... and nothing on the face of the Act suggested it [was] anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."⁶¹ Under the test proposed here, it does not matter if [*403] religious organizations are awarded public grants for secular functions; it does not even matter if religious organizations are the only ones competing for those grants. All that matters is that the competition is open to both secular and religious organizations alike, and that the funding decision is not made on religious grounds.⁶² Nevertheless, the Eighth Circuit reached an opposite result in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, where the court held that a governmental aid program benefiting a faith-based residential inmate program at a medium security prison violated the Establishment Clause.⁶³ Although the program was based on Christian values and contained religious content, an inmate's participation in the program was completely voluntary; nonetheless, the court ruled that both the direct aid to the faith-based provider violated the Establishment Clause, as did the more indirect, per diem program.⁶⁴ But, contrary to the Eighth Circuit holding, while the Establishment Clause prevents government from giving preferential treatment to religion, it also prohibits government from discriminating against it.⁶⁵

[*404]

C. Judicial Support for the Proposed Test

funds are to be distributed. For a discussion of the Zelman decision and the role of choice, see Ira C. Lupu & Robert Tuttle, Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, [78 Notre Dame L. Rev. 917, 927-49 \(2003\)](#).

⁶¹ [Bowen, 487 U.S. at 608](#). Under the Act, the federal government funded private organizations involved in the area of adolescent sexual abstinence and pregnancy care. [Id. at 594](#). The Act was challenged on the ground that it violated the Establishment Clause, since some of the groups receiving funds were tied to religious organizations. [Id. at 597-98](#). According to the Court, the Establishment Clause only requires that a social welfare program have a legitimate secular purpose and is neutral regarding the beneficiaries' religious status. See [id. at 602-03, 608](#).

⁶² Some commentators argue that the government may fund a religious provider of social services only if the program's users and beneficiaries are also given the choice of similar services from a secular provider. See Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 203 (2007). In other words, the government may provide funds to a religious organization as long as it also funds a nonreligious provider. This requirement, however, can work to prejudice religious providers of social services, since their funding will depend on the existence of competitive secular providers. Moreover, for many kinds of social services - e.g., family development and character-building prison services - religious groups may be the primary if not exclusive providers, primarily because such work so closely ties in with their religious values and mission. Indeed, certain public service areas like prisoner rehabilitation overwhelmingly seem to attract service providers with a religious identity or association. See Laurie Goodstein, *Group Sues Christian Program at Iowa Prison*, N.Y. Times, Feb. 13, 2003, at A39 (describing a faith-based prisoner rehabilitation program that has been adopted in at least four states); cf. Garry, *Wrestling with God*, supra note 3, at 142 (illustrating the appropriateness of a flexible system that does not automatically disallow government aid to religious organizations).

⁶³ [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 413, 425 \(8th Cir. 2007\)](#).

⁶⁴ [Id. at 414, 425-26](#).

⁶⁵ See [Mitchell v. Helms, 530 U.S. 793, 828 \(2000\)](#) (plurality opinion). In *Bowen*, the Court stated that the Establishment Clause should not be an outright ban on the public funding of religious groups' involvement in social welfare programs. [Bowen, 487 U.S. at 609](#). And as Justice Thomas stated in *Mitchell*, "Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." [Mitchell, 530 U.S. at 829](#) (plurality opinion). Indeed, even though the Court has never found an establishment of secularism or nonreligion, the spirit and purpose of the Establishment Clause can be violated by government hostility to religious institutions and by the government taking sides in favor of secular institutions over religious ones, which by itself is a violation of religious liberty.

The proposed two-step test has been approximately recognized by the plurality opinion in *Mitchell v. Helms*, which considered the constitutionality of a federal program that loaned certain education materials directly to both public and private schools.⁶⁶ The materials, of course, had to be "secular, neutral and non-ideological."⁶⁷ The Court upheld the program even though the public aid went directly from the government to the schools, some of which were religious.⁶⁸ What was important was that the aid itself not be religious and that eligibility for the aid be determined in a neutral manner.⁶⁹ Thus, neutrality, or the government's nonreligious choice criteria for distributing the funds, severed any connection between government aid and religious establishment.⁷⁰

Mitchell put to rest the notion that the Establishment Clause should somehow treat pervasively sectarian organizations differently from other, less (or non) religious organizations.⁷¹ Indeed, the nature or identity of an institution has no relevance in the proposed two-step test. The only relevance that the pervasively sectarian notion could have would be to the question of whether participants in a program [*405] being conducted with public funds by the pervasively sectarian organization felt coerced to participate in the organization's religious activities. But this involves a choice or freedom at a different level than the choice element described above. This is not a choice at the governmental level, concerned with which institution to fund; rather, it is a choice at the ultimate user level, involving the freedom of the individual to avoid being coerced in his or her religious exercise. At this level, the Establishment Clause does not apply; it is the Free Exercise Clause that applies.⁷²

⁶⁶ [Mitchell, 530 U.S. at 801](#) (plurality opinion).

⁶⁷ [Id. at 802](#).

⁶⁸ [Id. at 801](#).

⁶⁹ [Id. at 820, 825](#).

⁷⁰ See *id.*

⁷¹ [Id. at 826](#); see also Ira C. Lupu & Robert Tuttle, The Faith-Based Initiative and the Constitution, [55 DePaul L. Rev. 1, 37-39 \(2005\)](#) (arguing that if an organization agrees to perform a needed secular function, the religious identity or nature of the organization should not have any bearing on Establishment Clause considerations). The *Mitchell* Court erased "whatever doubt remained ... about the scope of the Court's turn away from the doctrine of 'pervasively sectarian' organizations" being constitutionally ineligible for government aid. Lupu & Tuttle, *supra*, at 23-24. Previous case law had established a presumption that pervasively sectarian organizations would use any and all public funds for religious purposes, and hence that public funds could not go to pervasively sectarian institutions. See, e.g., [Bowen v. Kendrick, 487 U.S. 589, 610 \(1988\)](#). For instance, in [Meek v. Pittenger, 421 U.S. 349, 363, 372 \(1975\)](#), overruled by [Mitchell, 530 U.S. at 808](#), the Court essentially disqualified pervasively sectarian religious organizations from direct public funding simply because those organizations were predominately religious. But in *Mitchell*, Justice O'Connor argued against such a presumption of bad faith on the part of religious organizations receiving public funds. [Mitchell, 530 U.S. at 847, 853-60](#) (O'Connor, J., concurring in the judgment).

⁷² In *Mitchell*, the argument was made that government aid to religious schools might be diverted to some religious use; but Justice Thomas dismissed this argument, essentially maintaining that Establishment Clause concerns were limited to the point at which the government awarded the funds to the religious organization. [Mitchell, 530 U.S. at 820-25](#) (plurality opinion). What happened to the money after the award was made could not be attributed to the government "and is thus not of constitutional concern." [Id. at 820](#). What Justice Thomas did not explain, but what is proposed here, is that any indoctrination or coercion occurring after the religious organization receives the funds is a matter for the Free Exercise Clause, not the Establishment Clause.

As the Court in *Bowen* warned, even under a facially neutral statute such as the Adolescent Family Life Act, religious organizations receiving federal funds could still use those funds for improper religious purposes. [Bowen, 487 U.S. at 609-10](#). The mere possibility of this diversion, however, is not enough to cause an Establishment Clause violation. [Id. at 611](#). But again, this should not be an Establishment Clause concern. Any organization subjecting the users of its publicly funded programs to religious indoctrination would be subject to the Free Exercise Clause. For instance, if the users of a public program being administered by religious groups are forced to participate in an unwanted religious experience as a condition to receiving the government benefits, then a Free Exercise claim can be made by those users. Moreover, by accepting funds the religious

Because the proposed two-part test focuses the choice element only at the point where government chooses which organization to fund, the distinction between direct and indirect aid is no longer important, as Justice Thomas stated in *Mitchell*.⁷³ Moreover, the test [*406] is a refinement of that announced in *Agostini v. Felton*,⁷⁴ which altered the *Lemon* test and articulated a new test for evaluating programs that provide public funds to religious organizations.⁷⁵ Under the *Agostini* test, a court must examine whether a valid secular purpose exists for the program; whether the government funding results in religious coercion or indoctrination; and whether incentives exist that favor religious organizations.⁷⁶ Essentially, the first and third prongs of the *Agostini* test are the same as the two prongs of the test proposed in this Article. The second prong, however, should be left to the Free Exercise Clause to address.⁷⁷

organization submits itself to government monitoring of its funds. If the government finds that the funds are not being put to the use for which they were given, the government may terminate the funding.

⁷³ [Mitchell, 530 U.S. at 818](#) (plurality opinion) (stating that whether the public aid is labeled "'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis"). In *Zelman*, the Court recognized that the Cleveland school voucher program gave indirect aid to religious schools, but that any aid going to religious schools was the result of the private choices of parents who had received the government vouchers and were free to spend them at any school. [Zelman v. Simmons-Harris, 536 U.S. 639, 652-53 \(2002\)](#). According to the Court in *Zelman*, the vouchers, and hence the parents' private choices, cut the chain of causation between the public funds and any religious activities of schools receiving the vouchers. *Id.* But when *Mitchell* is considered along with *Zelman*, it is unclear how important the direct-indirect distinction will continue to be in the future. Justice O'Connor's concurrence in *Zelman* still stressed the importance of public aid passing "through the hands of beneficiaries," as effecting true private choice, but the Court's majority seemed to consider the general notion of neutrality more important than the requirement of beneficiary choice. Compare [id. at 670](#) (O'Connor, J., concurring), with [id. at 653-54](#) (majority opinion). Direct aid, of course, has been held unconstitutional by several lower courts. See, e.g., [Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 954 \(W.D. Wis. 2002\)](#) (overturning a direct grant to a religious drug treatment provider that engaged in religious indoctrination), *aff'd*, [324 F.3d 880 \(7th Cir. 2003\)](#).

In the past, indirect aid, or at least individual choice, was seen as breaking the connection between government aid and the religious activities of religious groups. See Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, [21 Wash. U. J.L. & Pol'y 225, 233 \(2006\)](#). With indirect aid, individuals, usually the parents in school cases, are seen as making the choice of where the funds go; but when government directly gives aid, "we see government sponsorship of religious indoctrination." *Id.* at 234. But this distinction goes to presumptions and perceptions - perceptions about whether government is putting its support behind some particular religion. We do not need to make assumptions, or worry about perceptions, if we measure the constitutionality of the funding program only at the point of the government decision. If the government is not making the decision on religious grounds, nor funding religious activities, then there can be no state establishment of religion.

⁷⁴ [521 U.S. 203 \(1997\)](#). The Court overturned the injunction previously sanctioned in [Aguilar v. Felton, 473 U.S. 406, 414 \(1985\)](#), that had prohibited the government from funding a program providing remedial instruction to disadvantaged children in religious schools. [Agostini, 521 U.S. at 208-09](#). In doing so, the Court altered its stance on two important issues. First, it discarded the presumptions against pervasively sectarian institutions. See [id. at 223](#) (stating that the Court had abandoned the presumption "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion"). Second, it rejected the notion that government established a religion if individual recipients diverted government funds for religious activities, holding that this diversion was not attributable to the government. See [id. at 225-26](#). Thus, as long as its initial decision was neutrally based, the government could not be responsible for subsequent religious choices made by the private recipients of public funds.

⁷⁵ According to the *Lemon* three-part test, the Establishment Clause required that any government statute must have a secular purpose, that its primary effect not be to advance religion, and that it not foster an excessive governmental entanglement with religion. [Lemon v. Kurtzman, 403 U.S. 602, 612-13 \(1971\)](#).

⁷⁶ [Agostini, 521 U.S. at 223-34](#).

⁷⁷ The second prong, government-attributed indoctrination, was used by Justice O'Connor in her concurring opinion in *Mitchell*, where she stated that the Establishment Clause requires an inquiry into "'whether [public] aid has the 'effect' of advancing or inhibiting religion.'" [Mitchell, 530 U.S. at 845](#) (O'Connor, J., concurring in the judgment) (quoting [Agostini, 521 U.S. at 222-23](#)). But this inquiry is essentially into whether any religious indoctrination that occurred in any program receiving public funds is to be

[*407] The test proposed in this Article allows government to accommodate religion, so long as it does not intrude into that religion's institutional autonomy, and so long as it does not prefer one religious sect over another. This type of accommodation was approved in *Cutter v. Wilkinson*, where the Court upheld section 3 of the Federal Religious Land Use and Institutionalized Persons Act, holding that the Act on its face did not violate the Establishment Clause.⁷⁸ Furthermore, just as many accommodations do not rise to the level of an establishment, neither do regulatory exemptions for religiously motivated behavior constitute an established religion.⁷⁹ **[*408]** The Establishment Clause focuses on what the government does, not on what religious organizations do. An unconstitutional establishment of religion can only result from governmental action, not from the action of private entities.

Conclusion

Religious organizations have long been involved in social welfare work, even longer than the federal government.⁸⁰ They have a proven expertise, and their religious beliefs compel them to perform such services. Just because the federal government has largely taken over this area should not automatically disqualify religious organizations from active involvement. But in order to facilitate this involvement, a clearer, more objective Establishment Clause test is needed.

The test proposed in this Article seeks to conform the Establishment Clause doctrine to the original intent behind the First Amendment and eliminate any hostility toward or discrimination against religious organizations' involvement in publicly funded social welfare services. It also seeks to create an Establishment Clause

attributed to the government. Under the model proposed in this Article, however, this inquiry is better suited under the Free Exercise Clause than the Establishment Clause. Moreover, it is difficult to see why the courts have allowed such wide latitude in holding the government responsible for independent, religious actions taken by private recipients of public funds, especially in comparison with the state action doctrine. In other words, why does the Establishment Clause doctrine allow for wider latitude of governmental responsibility than does the state action doctrine? See generally Carl H. Esbeck, *Church-State Relations in America: What's at Stake and What's Not*, *Liberty*, May-June 2005, at 3, 27-28 (explaining that the offender must be a government actor not a private institution to constitute state action, which is a prerequisite for any Establishment Clause violation).

Justice O'Connor argues that the government could bear constitutional responsibility if a recipient of public funds uses those funds to inculcate religion. See *Mitchell*, [530 U.S. at 859-61](#) (O'Connor, J., concurring in the judgment). But this requirement would make the Establishment Clause dependent on what private entities did. The government's neutral treatment of religion occurs at the point when the government distributes the funds to grantees, not at some subsequent time when the grantee might undertake some unauthorized action. This is a matter for both the Free Exercise Clause and the political process. If it is found that religious organizations are putting public funds to religious purposes rather than to the purposes for which they received their funds, then not only have those organizations violated the agreement of their grant, but the political process should then demand that aid to those religious organizations cease.

⁷⁸ *Cutter v. Wilkinson*, [544 U.S. 709, 713-14 \(2005\)](#). The Act requires a compelling governmental interest and the least restrictive means used if the government places any "substantial burden on the religious exercise of a person residing in or confined to an institution." Religious Land Use and Institutionalized Persons Act, [42 U.S.C. § 2000cc-1\(a\)](#) (2000). The Court held that this Act was "a permissible legislative accommodation of religion." *Cutter*, [544 U.S. at 720](#). According to the Court, the Act did not facially "differentiate among bona fide faiths" nor did it confer a "privileged status on any particular religious sect," nor "single[] out [any] bona fide faith for disadvantageous treatment." [Id. at 723-24](#).

⁷⁹ Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, [81 Notre Dame L. Rev. 1793, 1796 \(2006\)](#) (stating that, even though exemptions give special preference to a particular religious practice, the Court has "unanimously rejected the claim that regulatory exemptions for religiously motivated conduct establish the unregulated religion"). Professor Laycock concludes that "there is no significant originalist support for the core idea that exempting religion from regulation establishes religion." *Id.* at 1798. "Exemptions were never part of the establishment; they grew out of a political commitment to free exercise." *Id.* at 1803.

⁸⁰ Thomas W. Pickrell & Mitchell A. 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. Probs.* 111, 112-13 (1981).

jurisprudence that fully recognizes the constitutional relationship between the two religion clauses of the First Amendment.

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