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## Governmental Aid to Religious Entities: The Total Subsidy Position Prevails

### Cover Page Footnote

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# GOVERNMENTAL AID TO RELIGIOUS ENTITIES: THE TOTAL SUBSIDY POSITION PREVAILS

G. SIDNEY BUCHANAN\*

## INTRODUCTION

IN two recent cases, *Mueller v. Allen*<sup>1</sup> and *Bowen v. Kendrick*,<sup>2</sup> the United States Supreme Court sustained particular forms of governmental financial aid to religious entities. In both cases, the Court, by a 5 to 4 vote, held that the aid in question did not constitute a prohibited establishment of religion. These two decisions represent the culmination of a significant conceptual evolution in this difficult area of constitutional law. In relation to government funding of the secular activities of religious entities, the Court, in *Mueller* and *Kendrick*, has moved to what can be fairly characterized as a "total subsidy" position.<sup>3</sup>

Under the total subsidy position, governmental aid to religious entities is constitutionally permissible if two conditions are met. First, the aid must support only the secular activities of the religious entity involved (the "no religious use" restriction). Second, the aid must be offered under substantially equal conditions to non-religious entities, both public and private (the "equal access" restriction). If these two conditions are met, *Mueller* and *Kendrick* teach us that the aid in question does not violate the establishment clause. Under this approach, the amount of government aid received by a religious entity does not affect the question of constitutionality. Moreover, it does not matter that the government aid received by the religious entity frees other funds for use by the entity in the support of its religious activities.<sup>4</sup> If the above two conditions are met, the governmental aid survives attack.

Clearly, the total subsidy position operates generously in favor of gov-

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1. 463 U.S. 388 (1983).

2. 108 S. Ct. 2562 (1988).

3. The "total subsidy position" is a phrase coined by the author in a 1978 law review article. See Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 Hous. L. Rev. 783, 822 (1978). The phrase has its origin in cases such as *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1970), *aff'd*, 403 U.S. 602 (1971), in which the court noted that allowing government to aid the secular activities of religious schools would allow "almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." *Id.* at 120. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (affirming *DiCenso*), Justice Douglas quoted this passage in his concurring opinion. See *id.* at 641.

4. "One fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller*, 463 U.S. at 393 (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973)).

ernment aid to the secular activities of religious entities. Government programs aiding religious organizations can meet the constitutional requirements of the total subsidy position with little difficulty. Under this position, the degree of governmental aid to religious entities is left largely to the political process for resolution.

Part I of this Article will engage in a critical analysis of the total subsidy position as manifested in the *Mueller* and *Kendrick* decisions and will explore the conceptual and policy implications of that position. Part II will briefly review three options that the Court could utilize in its establishment clause analysis. While accepting the emergence of the total subsidy position as a *fait accompli* that cannot be practically reversed, Part III will conclude by rejecting that position as applied in the majority opinions of *Mueller* and *Kendrick*. Instead, in the spirit of the *Mueller* and *Kendrick* dissents, Part IV of this Article urges that the no religious use and equal access restrictions of the total subsidy position be applied more sternly in determining the constitutional validity of governmental aid to religious entities<sup>5</sup> and that only a narrow application of the total subsidy approach can ensure that the enduring values embodied in the establishment clause are adequately protected.

## I. THE TOTAL SUBSIDY CASES

### A. *Mueller v. Allen*

#### 1. The Majority Opinion

In *Mueller v. Allen*,<sup>6</sup> the Supreme Court considered a challenge to a Minnesota statute that allowed a state income tax deduction for the "actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools."<sup>7</sup> The maximum

5. The Supreme Court has repeatedly held that the religious guarantees of the first amendment apply in full measure to state governments and their political subdivisions by reason of the due process clause of the fourteenth amendment. *See, e.g.,* *Everson v. Board of Educ.*, 330 U.S. 1, 13-15 (1947). Accordingly, as used in this article, government aid includes aid provided by either the federal or state governments.

6. 463 U.S. 388 (1983). Then Justice Rehnquist wrote the majority opinion and was joined by Chief Justice Burger and by Justices White, Powell and O'Connor.

7. *Id.* at 391. The Minnesota statute read as follows:

"Tuition and transportation expense. The amount he has paid to others, not to exceed \$500 for each dependent in grades K to 6 and \$700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, 'textbooks' shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or

deduction was "\$500 per dependent in grades K through 6 and \$700 per dependent in grades 7 through 12."<sup>8</sup> This deduction was available to all parents who sent their children to any accredited public or private school. In the school year prior to the Court's decision, 820,000 students attended public elementary and secondary schools in Minnesota, while approximately 91,000 students attended some 500 private schools in Minnesota. Around 95% of the students attending private schools were enrolled in sectarian schools.<sup>9</sup>

The Court acknowledged that "the Establishment Clause presents especially difficult questions of interpretation and application,"<sup>10</sup> stating that the "general nature of our inquiry in this area has been guided"<sup>11</sup> by the three-part test set forth in *Lemon v. Kurtzman*.<sup>12</sup> Under the *Lemon* test, to survive a challenge that it violates the establishment clause, a statute must first "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>13</sup> Characterizing the *Lemon* test as providing "'no more than [a] helpful signpos[t],"<sup>14</sup> the Court turned to the Minnesota statute.

The Court concluded that the statute easily satisfied the secular purpose requirement of the *Lemon* test<sup>15</sup> reasoning that "[a] State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."<sup>16</sup> Such a program of assistance "plainly serves [the] secular purpose of ensuring that the State's citizenry

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worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature."

*Id.* at 390 n.1 (quoting Minn. Stat. § 290.09(22) (1982)). This statute was subsequently repealed by 1987 Minn. Laws c. 268, art. 1, § 127.

8. *Mueller*, 463 U.S. at 391.

9. *See id.*

10. *Id.* at 392.

11. *Id.* at 394.

12. 403 U.S. 602 (1971). Because the phrase total subsidy position is the author's invention, it is not possible to describe exactly the relationship between the total subsidy position and the three-part test adopted by the Court in *Lemon*. Analysis of the type embodied in the total subsidy position is an unacknowledged undercurrent in many Supreme Court establishment clause cases. In most cases involving total subsidy concerns, the secular purpose prong of the *Lemon* test is easily satisfied, and the Court focuses on the primary effect and excessive entanglement prongs. In this author's opinion, the Court, while applying the *Lemon* test in name, is in substance using the equal access and no religious use restrictions of the total subsidy position in its application of the primary effect and excessive entanglement prongs of the *Lemon* test. Further, the restrictions of the total subsidy position appear to be applied by the Court primarily in its analysis of the primary effect prong.

13. *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (quoting *Lemon*, 403 U.S. at 612-13).

14. *Id.* (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

15. *See id.* at 394-95.

16. *Id.* at 395.

is well educated."<sup>17</sup> Moreover, financial support flowing to private schools, both sectarian and nonsectarian, enables such schools to educate "a substantial number of students" and thus "relieve[s] public schools of a correspondingly great burden—to the benefit of all taxpayers."<sup>18</sup> For these and other reasons, the Court held that the Minnesota statute satisfied "the secular purpose inquiry" of the *Lemon* test.<sup>19</sup>

The Court then turned to the "more difficult"<sup>20</sup> primary effect prong of the *Lemon* test. After stressing the traditionally broad latitude accorded to legislatures in the enactment of tax statutes,<sup>21</sup> the Court discussed a series of primary effect weight factors that it believed supported the validity of the Minnesota statute. First and foremost among these factors was the equal access condition of the total subsidy position. Here, the Court noted that the deduction under the Minnesota statute "is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools."<sup>22</sup> The Court reasoned that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."<sup>23</sup> In this respect, the Court distinguished the Minnesota program from that involved in *Committee for Public Education & Religious Liberty v. Nyquist*<sup>24</sup> under which "public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools."<sup>25</sup>

Under its primary effect analysis, the Court also stressed the fact that the direct aid recipients were not the sectarian schools. Here, the Court noted that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."<sup>26</sup> In the Court's opinion, this more indirect form of aid carried less risk of the "imprimatur of state approval"<sup>27</sup> of religion and rendered more "attenuated" the financial benefits flowing to religious schools under the Minnesota statute. In the Court's words: "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."<sup>28</sup>

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17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.* at 396.

21. *See id.*

22. *Id.* at 397.

23. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

24. 413 U.S. 756 (1973).

25. *Mueller v. Allen*, 463 U.S. 388, 398 (1983).

26. *Id.* at 399.

27. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

28. *Id.* at 400.

Based on these factors, the Court held that the Minnesota statute satisfied the primary effect prong of the *Lemon* test.<sup>29</sup> In so holding, the Court declined "to engage in [an] empirical inquiry"<sup>30</sup> into the question of which group of taxpayers benefited most from the tax deductions allowed under the Minnesota program.<sup>31</sup> This refusal to examine the actual economic effect of the Minnesota program constitutes a major weakness in the Court's analysis, which Justice Marshall strongly criticized in his dissenting opinion.<sup>32</sup> This Article argues that inquiry into actual economic effect is a legitimate and persuasive means of determining whether a particular form of governmental aid has the primary effect of advancing or inhibiting religion.<sup>33</sup>

Turning to the third part of the *Lemon* test, the Court had "no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the State in religion."<sup>34</sup> The main entanglement concern stemmed from the statute's requirement that state officials disallow deductions for the cost of "'instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.'"<sup>35</sup> While conceding that this requirement would involve some degree of oversight on the part of the state, the Court held that "[m]aking decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court."<sup>36</sup> Accordingly, the oversight required by the statute fell far short of the "'comprehensive, discriminating, and continuing state surveillance'"<sup>37</sup> necessary to constitute a violation of the establishment clause under the entanglement prong of the *Lemon* test. Therefore, the statute's prohibition against deductions for the cost of religiously oriented textbooks and materials also satisfied the "no religious use" restriction of the total subsidy position.

## 2. The Marshall Dissent

Justice Marshall's dissent in *Mueller*<sup>38</sup> focused on the Court's analysis of the primary effect prong of the *Lemon* test. The dissent argued that the Minnesota statute failed to meet either of the conditions of the total subsidy position adopted by the majority. Under the dissent's analysis, the program authorized by the statute did not provide an adequate safeguard against the use of government aid for religious purposes nor did it

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29. *Id.* at 402.

30. *Id.*

31. *See id.*

32. *See id.* at 408-11 (Marshall, J., dissenting).

33. *See infra* notes 186-196 and accompanying text.

34. *Mueller v. Allen*, 463 U.S. 388, 403 (1983).

35. *Id.* (quoting Minn. Stat. § 290.09(22) (1982)).

36. *Id.*

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

38. *Id.* at 404 (Marshall, J., dissenting). The dissenting opinion in *Mueller* was written by Justice Marshall and joined by Justices Brennan, Blackmun and Stevens.

make such aid available to users of non-religious entities on substantially the same basis as to users of religious entities. The program thus violated both the no religious use and equal access conditions of the total subsidy position.

On the equal access front, the dissent engaged in the empirical inquiry eschewed by the majority and examined closely the actual economic effect of the tax deductions authorized by the Minnesota statute. Noting that "the single largest expense that may be deducted under the Minnesota statute is tuition,"<sup>39</sup> the dissent stated that "[f]ewer than 100 of more than 900,000 school-age children in Minnesota attend public schools that charge a general tuition."<sup>40</sup> Moreover, "[o]f the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools."<sup>41</sup> Based on these figures, the dissent characterized the Minnesota statute as "little more than a subsidy of tuition masquerading as a subsidy of general educational expenses."<sup>42</sup> The dissent conceded that parents sending their children to public schools could, under the Minnesota program, deduct such educational expenses as "the cost of gym clothes, pencils, and notebooks,"<sup>43</sup> but characterized such expenses as "*de minimis* in comparison to tuition expenses."<sup>44</sup>

In substance, therefore, the dissent saw the Minnesota program as tailor-made for the users of religious schools.<sup>45</sup> While on its face aiding the users of all schools, public and private, the Minnesota statute had the actual economic effect of benefiting the users of religious schools.<sup>46</sup> From a practical economic perspective, the users of public schools did not enjoy "equal access" to the aid authorized by the Minnesota statute because the main benefit of that aid, tuition deductions, could only be realized by users of tuition-charging schools which were primarily reli-

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39. *Id.* at 408.

40. *Id.* at 409.

41. *Id.*

42. *Id.* at 408-9.

43. *Id.* at 408.

44. *Id.* at 409.

45. The "hand-tailored" concept was persuasively advanced by Justice Fortas in his dissenting opinion in *Board of Education v. Allen*, 392 U.S. 236, 269 (1968):

This is not a "general" program. It is a specific program to use state funds to buy books prescribed by sectarian schools which, in New York, are primarily Catholic, Jewish, and Lutheran sponsored schools. It could be called a "general" program only if the school books made available to all children were precisely the same—the books selected for and used in the public schools. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments? *Id.* at 270-71.

46. The dissent's economic analysis is set forth in *Mueller v. Allen*, 463 U.S. 388, 408-11 (1983) (Marshall, J., dissenting).

gious schools.<sup>47</sup> For these reasons, the dissent concluded that the Minnesota program was in substance the same as the New York program condemned by the Court in *Committee for Public Education v. Nyquist*.<sup>48</sup> In *Nyquist*, the Court held unconstitutional a New York program of "public assistance amounting to tuition grants [that were] provided only to parents of children in *nonpublic* schools."<sup>49</sup> That, reasoned the dissent in *Mueller*, was precisely the substantive economic effect of the tax deductions authorized by the Minnesota statute.<sup>50</sup>

In the second branch of its attack on the majority opinion in *Mueller*, the dissent argued that the Minnesota program contained no practical guarantee against the use of government aid for religious purposes and, therefore, violated the no religious use restriction of the total subsidy position.<sup>51</sup> The dissent stressed that "the assistance that flows to parochial schools as a result of [the tax deduction for tuition] is not restricted, and cannot be restricted, to the secular functions of those schools."<sup>52</sup> In a similar vein, the dissent argued that "Minnesota's tax deduction for the cost of textbooks and other instructional materials is also constitutionally infirm."<sup>53</sup> The dissent concluded that instructional materials "plainly may be used to inculcate religious values and belief"<sup>54</sup> and urged the Court to overrule its 1968 decision in *Board of Education v. Allen*,<sup>55</sup> which held that a state may lend secular textbooks to parochial schools without violating the establishment clause.<sup>56</sup> That decision, argued the dissent, "is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools."<sup>57</sup> The dissent stressed that, in contrast to the program sustained in the 1968 *Allen* decision, the Minnesota statute did not limit deductions for textbook costs to books approved for use in Minnesota's public schools.<sup>58</sup>

The *Mueller* dissent attacked the manner in which the majority applied the total subsidy position without framing a sterner test to determine the validity of government aid to religious entities. The dissent argued persuasively that the Minnesota program did not even meet the no religious use and equal access conditions of the total subsidy position.

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47. See *supra* note 9 and accompanying text.

48. 413 U.S. 756 (1973).

49. *Mueller*, 463 U.S. at 398.

50. See *id.* at 408-11.

51. See *id.* at 413-15.

52. *Id.* at 413.

53. *Id.* at 414.

54. *Id.*

55. 392 U.S. 236 (1968).

56. See *id.* at 248. Justice Black's dissenting opinion in *Board of Education v. Allen* stressed that books are readily subject to ideological manipulation. Accordingly, when government purchases books "for use by sectarian schools," government "directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar." *Id.* at 252-53.

57. *Mueller v. Allen*, 463 U.S. 388, 415 (1983).

58. See *id.*

However, the dissent did not address the question of whether the total subsidy position is the most appropriate test for determining when a program of governmental aid constitutes a prohibited establishment of religion. The *Mueller* majority, in contrast, vigorously embraced the total subsidy position without strictly enforcing its conditions. While giving lip service to those conditions, the majority drained them of practical force by refusing to inquire into the actual economic effect of the Minnesota program.

## B. *Bowen v. Kendrick*

### 1. The Majority Opinion

*Bowen v. Kendrick*<sup>59</sup> is an intriguing case, involving a challenge to federal funding of "services relating to adolescent sexuality and pregnancy."<sup>60</sup> Congress passed the Adolescent Family Life Act (AFLA or Act) "in 1981 in response to the 'severe adverse health, social, and economic consequences' that often follow pregnancy and childbirth among unmarried adolescents."<sup>61</sup> The Court described AFLA as "a scheme for providing grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy.'"<sup>62</sup> The Court further explained:

[G]rant recipients are to provide two types of services: "care services," for the provision of care to pregnant adolescents and adolescent parents, and "prevention services" for the prevention of adolescent sexual relations. While the AFLA leaves it up to the Secretary of Health and Human Services . . . to define exactly what types of services a grantee must provide, the statute contains a listing of "necessary services" that may be funded. These services include pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and perhaps most importantly for present purposes, "educational services relating to family life and problems associated with adolescent premarital sexual relations."<sup>63</sup>

Based on a congressional finding that "'problems of adolescent premarital sexual relations'"<sup>64</sup> are "'best approached through a variety of integrated and essential services,'"<sup>65</sup> AFLA requires grant recipients to describe how they will involve various private groups, including both religious and nonreligious organizations, and public entities in the provision of services.<sup>66</sup> AFLA contains no express restriction against the use

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59. 108 S. Ct. 2562 (1988). The majority opinion was written by Chief Justice Rehnquist and joined by Justices White, O'Connor, Scalia and Kennedy.

60. *Id.* at 2565.

61. *Id.* at 2566 (quoting 42 U.S.C. § 300z(a)(5) (1982 & Supp. III 1985)).

62. *Id.* (citation omitted).

63. *Id.* (citations omitted).

64. *Id.* at 2567 (quoting 42 U.S.C. § 300z(a)(8)(A) (1982)).

65. *Id.* (quoting 42 U.S.C. § 300z(a)(8)(B) (1982)).

66. *See id.*

of grant money for religious purposes, an omission described by the *Kendrick* dissenters as “glaring.”<sup>67</sup>

The *Kendrick* Court summarized the history of grant applications and awards under AFLA:

Since 1981, when the AFLA was adopted, the Secretary has received 1,088 grant applications and awarded 141 grants. Funding has gone to a wide variety of recipients, including state and local health agencies, private hospitals, community health associations, privately-operated health care centers, and community and charitable organizations. It is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious denominations.<sup>68</sup>

In 1983, a group of federal taxpayers, clergymen, and the American Jewish Congress challenged the constitutionality of AFLA by filing suit in the United States District Court for the District of Columbia. Seeking both declaratory and injunctive relief, the plaintiffs argued that AFLA, on its face and as applied, constituted a prohibited establishment of religion in violation of the first amendment. The district court sustained this challenge, holding “AFLA . . . invalid both on its face and as applied ‘insofar as religious organizations are involved in carrying out the programs and purposes of the Act.’ ”<sup>69</sup> On appeal, the Supreme Court concluded:

first, that the District Court erred in holding that the AFLA is invalid on its face, and second, that the [district] court should consider on remand whether particular AFLA grants have had the primary effect of advancing religion. Should the court conclude that the Secretary’s current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply with the constitution and the statute. The judgment of the District Court is accordingly [r]everse[d].<sup>70</sup>

The *Kendrick* Court used the same three-prong *Lemon* test employed in *Mueller*. The Court first applied the test to the contention that AFLA was unconstitutional on its face. The Court had little difficulty in concluding that “AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood.”<sup>71</sup> The Court rejected the argument “that Congress had an impermissible purpose in adopting the AFLA because it specifically amended [AFLA’s predecessor] to increase the role of religious organizations in the programs sponsored by the Act.”<sup>72</sup> The expressed congres-

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67. *Id.* at 2594.

68. *Id.* at 2568 (citation omitted).

69. *Id.* (quoting Appendix to Jurisdictional Statement at 48a, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-431)).

70. *Id.* at 2581.

71. *Id.* at 2571.

72. *Id.*

sional purpose of involving a broad range of public and private organizations in alleviating the problems of teenage pregnancy led the Court to conclude that AFLA's express reference to religious entities was not evidence of a congressional purpose to engage in a prohibited endorsement of religion.<sup>73</sup>

Having disposed of the secular purpose prong of the *Lemon* test, the Court turned to the primary effect prong. The Court first considered the contention that AFLA impermissibly advanced religion by expressly recognizing the role of religious organizations in addressing problems of teenage sexuality.<sup>74</sup> The Court rejected this contention, stating that "[n]othing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems."<sup>75</sup> To the extent that such a recognition advances religion, the Court described the effect as " 'incidental and remote.' "<sup>76</sup> Moreover, the Court stressed that AFLA's recognition of religious entities occurs within the broader context of the Act's recognition of the roles played by a wide range of organizations, religious and nonreligious, in alleviating the problems of teenage sexuality.<sup>77</sup> In the Court's view, "this reflects the statute's successful maintenance of 'a course of neutrality among religions, and between religion and non-religion.' "<sup>78</sup>

As it continued its primary effect analysis, the Court considered the fact that AFLA permits religious institutions to receive federal funds.<sup>79</sup> The Court cited a series of cases as support for the proposition that "religious institutions are [not] disabled by the First Amendment from participating in publicly sponsored social welfare programs."<sup>80</sup> The Court stressed the variety of organizations that are eligible for grants under AFLA and concluded that "nothing on the face of the Act suggests the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."<sup>81</sup> The Court's analysis is persuasive on this point. AFLA does appear to grant equal access to all grant applicants without regard to their religious or nonreligious character. Consequently, in form and substance, AFLA satisfies the equal access condition of the total subsidy position. Unlike the tax deduction program in *Mueller*, the program authorized by AFLA does not have the primary economic effect of benefiting religious entities or their users to the practical exclusion of secular entities and their users.<sup>82</sup> AFLA is not

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73. *See id.*

74. *See id.* at 2572.

75. *Id.* at 2573.

76. *Id.*

77. *See id.* at 2567, 2573.

78. *Id.* at 2573 (quoting *School District v. Ball*, 473 U.S. 373, 382 (1985)).

79. *See id.*

80. *Id.* at 2574.

81. *Id.* at 2573.

82. On this point, AFLA closely approximates the program of governmental aid sus-

a subterfuge for funneling governmental aid to religious entities while providing only token aid to secular organizations. As will be discussed shortly, AFLA's fundamental problem lies elsewhere.

The Court next addressed the difficult conceptual question of whether AFLA impermissibly advances religion because it does not require that funds received by religious entities under the Act be used only for secular purposes. Essentially, this is a contention that AFLA violates the no religious use condition of the total subsidy position. In considering this contention, the Court rejected two related arguments: first, that the religious entities receiving grants under AFLA constitute " 'pervasively sectarian' institutions,"<sup>83</sup> second, that AFLA "authorizes 'teaching' by religious grant recipients on 'matters [that] are fundamental elements of religious doctrine,' such as the harm of premarital sex and the reasons for choosing adoption over abortion."<sup>84</sup> Each of these arguments, if true, supports the broader contention that AFLA permits religious organizations receiving grants under the Act to use government funds for religious purposes.

The Court tackled the "pervasively sectarian" institution argument first. Relying on an earlier case, the Court defined such an institution as one " 'in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.' "<sup>85</sup> The Court conceded that the receipt of governmental aid by such institutions created the threat that the funds, even if slated for a specified secular purpose, would advance the sectarian institution's " 'religious mission,' "<sup>86</sup> but promptly dismissed this concern by concluding that only a small proportion of AFLA aid recipients could be considered pervasively sectarian.<sup>87</sup> The Court noted that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions."<sup>88</sup> The risk that such organizations would be funded, held the Court, was not great enough to justify a facial invalidation of AFLA or even an invalidation of AFLA as applied to religious entities that are not pervasively sectarian.<sup>89</sup>

The Court was equally clear that AFLA does not impermissibly advance religion merely "because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents."<sup>90</sup>

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tained in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, a New Jersey program authorized local school districts to reimburse parents for the cost of transporting their children to school, whether the school be public or private, sectarian or non-sectarian. Under this program substantial economic benefits flowed both to the users of secular and religious institutions.

83. *Bowen v. Kendrick*, 108 S. Ct. 2562, 2574-75 (1988).

84. *Id.* at 2576.

85. *Id.* at 2574 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

86. *Id.*

87. *See id.* at 2575.

88. *Id.*

89. *See id.*

90. *Id.*

When governmental aid is received by religious entities that are not pervasively sectarian, the Court has "refused to presume that it would be used in a way that would have the primary effect of advancing religion."<sup>91</sup> Moreover, the Court stressed that a finding of prohibited effect could not be based on "the possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the [Act]."<sup>92</sup> In short, the Court held that the educational and counseling services in which AFLA permits religious entities to engage do not violate the no religious use restriction of the total subsidy position. Implicit in the Court's holding on this point is the questionable assumption that the educational and counseling services authorized by AFLA are not readily susceptible to ideological manipulation by the organizations providing the services.<sup>93</sup>

The Court was not troubled by the absence in AFLA of an express provision restricting the use of grant funds for religious purposes. The majority noted that AFLA requires grant applicants to describe in detail the services they hope to provide, how they intend to provide those services and, further, that AFLA requires evaluation of services that grantees actually provide. These requirements, the Court concluded, "create a mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes."<sup>94</sup> Given that statutory scheme, the Court held that the AFLA's lack of an express limitation on the use of federal funds for religious purposes did not have "the primary effect of advancing religion."<sup>95</sup>

The Court next turned to the entanglement prong of the *Lemon* test. Here, the Court conceded that the government would have to monitor the actual use of funds received by grant recipients under AFLA. The Court, however, repeated its earlier conclusion that "there is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be."<sup>96</sup> Building on that conclusion, the Court reasoned that the monitoring required under AFLA would be less intrusive than that required in the case of federal grants to pervasively sectarian institutions. Accordingly, the Court held that the degree of monitoring required under AFLA did not constitute "excessive entanglement" between government and religion in violation of the establishment clause.<sup>97</sup>

While the bulk of the *Kendrick* opinion examined the facial validity of AFLA, the Court considered more briefly the "as applied" challenge to

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91. *Id.* at 2576.

92. *Id.*

93. As will be seen shortly, the *Kendrick* dissenters vigorously attacked and rejected this assumption. *See id.* at 2588-91; *infra* notes 111-130 and accompanying text.

94. *Id.* at 2577.

95. *Id.*

96. *Id.* at 2578.

97. *See id.*

AFLA and, in substance, rejected it as well. The Court conceded that some AFLA grantees had indeed engaged in impermissible activities,<sup>98</sup> but concluded that the district court “did not adequately design its remedy to address the specific problems it found in the Secretary’s administration of the statute.”<sup>99</sup> In light of that conclusion, the Supreme Court remanded the case to the district court, directing that court to “consider . . . whether particular AFLA grants have had the primary effect of advancing religion” and, if so, to “devise a remedy to insure that grants awarded by the Secretary comply with the constitution and the statute.”<sup>100</sup>

## 2. The Blackmun Dissent

Justice Blackmun began his dissent<sup>101</sup> by questioning whether Congress intended that government funds would support a program which instructed parents and teenagers:

“You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church.”<sup>102</sup>

Citing this and other examples of the types of religious instruction supported by AFLA grants, the dissent stated that “[w]hatever Congress had in mind, . . . it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation.”<sup>103</sup> Such a record, the dissent urged, made it clear that AFLA grantees were using government monies to support religious indoctrination.<sup>104</sup>

The dissent then moved to attack the majority opinion more specifically. The dissent first criticized what it characterized as a “central premise” of the Court’s opinion, that “the primary means of ascertaining whether a statute that appears to be neutral on its face in fact has the effect of advancing religion is to determine whether aid flows to ‘pervasively sectarian’ institutions.”<sup>105</sup> The dissent argued that the Court’s premise was flawed for two reasons. First, the majority employed a narrow view of what constitutes a pervasively sectarian institution, largely limiting that label to parochial schools.<sup>106</sup> That approach “seems to

98. *See id.* at 2580.

99. *Id.*

100. *Id.* at 2581.

101. *Id.* at 2582 (Blackmun, J., dissenting). This dissent, written by Justice Blackmun, was joined by Justices Brennan, Marshall and Stevens.

102. *Id.* at 2583.

103. *Id.*

104. *See id.*

105. *Id.* at 2585.

106. *See id.* at 2586.

equate the characterization with the institution"<sup>107</sup> and effectively precludes extending the "pervasively sectarian" label to religious entities other than parochial schools.<sup>108</sup> Second, the dissent argued that the Court "err[ed] in suggesting that the inapplicability of the label is generally dispositive."<sup>109</sup> To the contrary, the dissent urged, the Court "never has treated the absence of such a finding as a license to disregard the potential for impermissible fostering of religion."<sup>110</sup> This is especially true in cases involving direct governmental aid to religious entities.

After it attacked the majority's use of the concept of the "pervasively sectarian institution," the dissent moved to its own analysis of AFLA under the *Lemon* test. Accepting the majority's view of AFLA's essentially secular purpose,<sup>111</sup> the dissent turned to the primary effect prong of the *Lemon* test.<sup>112</sup> Here, the dissent considered three factors that it believed to be dispositive: the actual recipient of the aid,<sup>113</sup> the age of those targeted by the programs,<sup>114</sup> and the nature of the service supported.<sup>115</sup> The influence of these factors convinced the dissent that the aid authorized by AFLA had the primary effect of advancing religion in violation of the establishment clause.

The dissent stressed that the aid authorized by AFLA involved "direct cash subsidies" to religious organizations.<sup>116</sup> The aid did not reach the religious entities indirectly by distribution to the users of such entities. When the aid recipient is the religious entity itself and not the user of the entity, "much closer scrutiny into the expected and potential uses of the [aid]"<sup>117</sup> is required to ensure that the aid will "not be used inconsistently with the Establishment Clause."<sup>118</sup> Citing past decisions, the dissent noted that a crucial safeguard against the prohibited use of direct aid to religious entities is that it be in a form already approved for use in public entities.<sup>119</sup> Under AFLA, "[t]he teaching materials that may be purchased, developed, or disseminated [by religious entities] with AFLA funding are in no way restricted to those already selected and approved for use in secular contexts."<sup>120</sup> Accordingly, the dissent argued that

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107. *Id.*

108. *See id.*

109. *Id.* at 2587.

110. *Id.*

111. *See id.*

112. *See id.*

113. *See id.* at 2587-88.

114. *See id.* at 2588-90.

115. *See id.* at 2590-91.

116. *Id.* at 2587.

117. *Id.*

118. *Id.*

119. *See id.* at 2587-88 (citing *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975)).

120. *Id.* at 2588.

AFLA lacked the guarantees necessary to protect against a prohibited use of government funds distributed directly to religious organizations.

With regard to the age of those targeted by AFLA, the dissent emphasized that governmental aid to religious entities serving persons of pre-college age has always been scrutinized more closely than aid to religious entities serving persons of college age and older.<sup>121</sup> In decisions sustaining direct governmental aid to colleges with religious affiliations, for example, "the Court has relied on the assumption that 'college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert' "<sup>122</sup> governmental prohibitions against the use of aid for religious purposes. Under AFLA, however, the "targeted audience" is composed primarily of pre-college age adolescents. Moreover,

AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make "a total separation between secular teaching and religious doctrine."<sup>123</sup>

The dissent agreed with the district court "that asking religious organizations to teach and counsel youngsters on matters of deep religious significance,"<sup>124</sup> while expecting the teachers to maintain a position of secular purity, "is both foolhardy and unconstitutional."<sup>125</sup> For the dissent, therefore, the age factor strongly suggested that AFLA's primary effect is to advance religion in violation of the establishment clause.

Even more troubling to the dissent was the nature of the service supported by AFLA. The dissent noted that AFLA authorizes grant recipients to counsel teenagers on a wide range of problems associated with teenage sexuality, "including the encouragement of adoption and premarital chastity and the discouragement of abortion."<sup>126</sup> It can "hardly be doubted," urged the dissent, that when such values are "promoted in theological terms by religious figures, [the] values take on a religious nature."<sup>127</sup> The pedagogical nature of the services supported by AFLA made them, in the opinion of the dissent, peculiarly susceptible to ideological manipulation. While conceding that government support of secular social welfare services is not prohibited by the Constitution simply

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121. *See id.* at 2589-90.

122. *Id.* at 2589 (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)).

123. *Id.*

124. *Id.* at 2588.

125. *Id.*

126. *Id.* at 2590.

127. *Id.*

because the services are provided by a religious organization, the dissent stressed that

[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.<sup>128</sup>

Accordingly, the dissent saw guidance on matters of conscience as the dominant feature of the services supported by AFLA. Because such services are more susceptible to religious indoctrination than services from which such guidance is absent, the dissent concluded that the nature of the service supported factor weighed strongly against the constitutionality of AFLA.<sup>129</sup> In combination, therefore, the aid recipient, age, and nature of the service supported factors led the dissent to conclude that AFLA, on its face, had the primary effect of advancing religion in violation of the establishment clause.<sup>130</sup>

The aid recipient, age, and nature of the service supported factors are thus crucial in determining whether a particular form of governmental aid has violated the no religious use restriction of the total subsidy position. The dissent reasoned that all three factors worked strongly against the constitutionality of AFLA and concluded that AFLA contained inadequate safeguards against the use of governmental aid for religious purposes. Accordingly, even under the liberal framework of the total subsidy option, AFLA does not pass constitutional muster. As in *Mueller*, the dissent in *Kendrick* was able to attack the majority opinion within the framework of the total subsidy position without having to determine whether a more stringent test should be employed in establishment clause cases.

To bolster its primary effect analysis, the *Kendrick* dissent stressed the "remarkable omission"<sup>131</sup> of any provision in AFLA prohibiting the use of governmental aid for religious purposes. Noting the presence of such a restriction in earlier decisions sustaining governmental aid to religious entities, the dissent stated that the absence of such a provision in AFLA "compounded"<sup>132</sup> the problem and made it still more clear that AFLA

128. *Id.* at 2591.

129. The dissent contrasted the services supported by AFLA with those supported in *Bradfield v. Roberts*, 175 U.S. 291 (1899), "a case in which the Court upheld the appropriation of money for the construction of two buildings to be part of a religiously affiliated hospital." *Bowen v. Kendrick*, 108 S. Ct. 2562, 2591 n.11 (1988). Providing medical aid to the sick, reasoned the dissent, is primarily not a mind-training function and, therefore, is not readily susceptible to ideological manipulation. *See id.*

130. *See Kendrick*, 108 S. Ct. at 2587-95.

131. *Id.* at 2592.

132. *Id.*

lacked adequate safeguards against the use of governmental funds for religious purposes.<sup>133</sup> The dissent characterized as “disingenuous[ ]”<sup>134</sup> the majority’s position that a “no religious use” restriction in AFLA is unnecessary because its legislative history reveals a “legislative intent not to promote religion.”<sup>135</sup> For the dissent, the absence of an express statutory prohibition against the use of governmental funds for religious purposes created an unacceptable risk that governmental aid would be used to promote religion in violation of the establishment clause. Without such a prohibition, the executive branch cannot create an enforcement mechanism with sufficient “bite” to police the grants authorized by AFLA.<sup>136</sup>

Having completed its analysis of the primary effect prong, the dissent dealt briefly and bluntly with the constitutionality of AFLA under the *Lemon* test’s entanglement prong. The dissent concluded that “the unconstitutionality of the statute becomes even more apparent when we consider the unprecedented degree of entanglement between Church and State required to prevent subsidizing the advancement of religion with AFLA funds.”<sup>137</sup> In reaching this conclusion, the dissent stressed three factors. First, the religious entities benefited under AFLA have a strong motivation to advance their religious positions through the counseling they provide to teenagers.<sup>138</sup> Second, it is very difficult to separate the religious and secular elements in counseling teenagers on matters of sexuality.<sup>139</sup> Finally, the grants authorized by AFLA are not “one-time construction grants” but, instead, extend over a period of time, thereby requiring a continuing financial relationship between government and recipient religious entities.<sup>140</sup> These factors convinced the dissent that the grant program authorized by AFLA would require an impermissible degree of government supervision to ensure that grants received by religious entities are not used for religious purposes. In the dissent’s view, the necessity for such ongoing and pervasive surveillance of religious entities clearly fosters an excessive entanglement between government and

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133. *See id.* at 2591-94.

134. *Id.* at 2592.

135. *Id.* at 2594.

136. The *Kendrick* dissent appears to be treating the absence of a no religious use provision as a separate ground for finding that AFLA has the primary effect of advancing religion in violation of the establishment clause. In other words, the absence of such a provision constitutes a per se violation of the no religious use restriction of the total subsidy position. Even if such a provision had been present in *Kendrick*, it seems clear that the dissent, through application of the aid recipient, age and nature of the service supported factors, would still have concluded that AFLA violated the no religious use restriction of the total subsidy position. For the dissent, therefore, the presence of an express no religious use provision is a *sine qua non*; its absence means certain defeat for programs of government aid to religious entities.

137. *Id.* at 2595.

138. *See id.* at 2596.

139. *See id.*

140. *See id.*

religion.<sup>141</sup>

In summarizing its position, the dissent concluded that "[t]he statutory language [of AFLA] and the extensive record established in the District Court make clear that the problem lies in the statute and its systematically unconstitutional operation, and not merely in isolated instances of misapplication."<sup>142</sup> Accordingly, the dissent, without remand, would have found AFLA unconstitutional.<sup>143</sup>

## II. A TALE OF THREE CONCEPTUAL OPTIONS

In a 1978 article entitled *Governmental Aid To Sectarian Schools: A Study in Corrosive Precedents*,<sup>144</sup> this author discussed three conceptual approaches that the Court might employ to determine the validity of government aid to sectarian schools: (1) the *Wolman* option;<sup>145</sup> (2) the Rutledge option;<sup>146</sup> and (3) the total subsidy option.<sup>147</sup>

The *Wolman* option takes its name from the Court's 1977 decision in *Wolman v. Walter*,<sup>148</sup> in which the Justices sustained certain forms of governmental aid to sectarian schools and invalidated others.<sup>149</sup> Under the *Wolman* option, the Court employs an ad hoc balancing of factors approach in determining the validity of governmental aid to sectarian schools.<sup>150</sup> While this balancing occurs within the framework of the

141. *See id.*

142. *Id.*

143. *See id.*

144. 15 Hous. L. Rev. 783 (1978).

145. *See id.* at 815-22.

146. *See id.* at 827-36.

147. *See id.* at 822-27.

148. 433 U.S. 229 (1977).

149. In *Wolman*, for example, the Court sustained governmental programs that provided the following types of aid to sectarian schools (similar types of aid were also provided to public schools and to non-sectarian private schools): secular textbooks, testing and scoring services, diagnostic services, and remedial services. In *Wolman*, the Court invalidated governmental aid to sectarian schools in the form of instructional materials and equipment and certain field trip services. *See* Buchanan, *supra* note 3, at 785-88 for a detailed description of the *Wolman* holding. As stressed by Justice Stevens in his separate opinion in *Wolman*, "[t]he line drawn by the Establishment Clause of the First Amendment must . . . have a fundamental character." *Wolman*, 433 U.S. at 265. The distinctions drawn by the *Wolman* majority lack that quality.

150. Some of the factors include whether the government aid is distributed to parents of all schoolchildren or only to those who send their children to private schools which are primarily sectarian, *see* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 782 n.38 (1973); whether the government aid is restricted to secular purposes and activities, *see id.* at 774; whether the service supported by the government aid is susceptible to ideological manipulation, *see* Meek v. Pittenger, 421 U.S. 349, 366 (1975); whether the government aid is given to institutions in which the religious and secular functions are "inextricably intertwined," *id.*; whether the service supported by the government aid occurs on the premises of a religious institution, *see id.* at 367, or at a neutral site, *see* *Wolman v. Walter*, 433 U.S. 229, 245 (1977); whether the service supported by the government aid is "prepared" by government employees or by the employees of a religious institution, *see* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654-58 (1980). Under the *Wolman* option, these and other factors were applied by shifting majorities of

three-prong *Lemon* test, the results under this approach are difficult to predict and, in some instances, even more difficult to defend.<sup>151</sup> Because of these weaknesses, it is understandable that a majority of the present Court has chosen to discard the *Wolman* option and to embrace the total subsidy position, which offers more certainty in its application and results. Under the *Wolman* option, the Court, in the late 1970s, had by its own admission reached a point at which the permissible scope of government aid to sectarian schools turned upon difficult questions of degree and a point at which the dividing line between church and state had become a "blurred, indistinct, and variable barrier . . ."<sup>152</sup>

The Rutledge option was advanced by Justice Rutledge in his dissent in *Everson v. Board of Education*.<sup>153</sup> Had it been adopted by a Court majority, establishment clause jurisprudence would have followed a significantly different course in the post-*Everson* years. Rutledge advanced the view that the Court should invalidate any form of governmental aid that is specifically earmarked to defray any part of the total cost of education in sectarian schools.<sup>154</sup> In *Everson*, for example, Rutledge's ap-

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the Court in a manner that made it difficult to predict the outcome of particular cases. While the Court professed to be applying these factors within the framework of the *Lemon* test, it is clear that no ongoing majority of the Court was connecting these factors to the three parts of the *Lemon* test in a consistent and understandable manner.

151. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court sustained a Pennsylvania program authorizing the state "to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Commonwealth's compulsory-attendance requirements." *Id.* at 353-54. The *Meek* Court invalidated a Pennsylvania program authorizing the state "to lend directly to the nonpublic schools 'instructional materials and equipment, useful to the education' of nonpublic school children." *Id.* at 354. Such materials and equipment included periodicals, photographs, maps, charts, sound recordings, films, projection equipment, recording equipment and laboratory equipment. Succinctly stated, therefore, the *Meek* Court held that books supplied to students are "in" and maps supplied to sectarian schools are "out."

The *Meek* Court also invalidated a Pennsylvania program providing various "auxiliary services," such as counseling, testing, and psychological services, to nonpublic school students. *See id.* at 367-73. Although provided to such students by public school system personnel, the Court held that such services were susceptible to ideological manipulation because they were rendered "only on the nonpublic school premises, and only when 'requested by nonpublic school representatives.'" *Id.* at 367. Later, in *Wolman*, this "on-site" factor was decisive for the Court majority in sustaining an Ohio program rendering similar services to nonpublic school students but only when performed "in public schools, in public centers, or in mobile units located off the nonpublic school premises." *Wolman v. Walter*, 433 U.S. 229, 245 (1977). Distinctions such as these rendered the *Wolman* option hopelessly unpredictable as an analytical framework for determining when a program of government aid was a prohibited establishment of religion.

152. *Wolman*, 433 U.S. at 236 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

153. 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting). The aid in question in *Everson* was approved by a 5 to 4 vote and thus, the Rutledge option was not adopted by the Court.

154. This is the general test that emerges from Part III of Rutledge's dissenting opinion in *Everson*. *See id.* at 44-49. In describing the New Jersey plan involved in *Everson*, Rutledge stated:

Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children

proach would have invalidated that part of New Jersey's education program that reimbursed parents for the cost of transporting their children to sectarian schools.<sup>155</sup> These transportation reimbursements would be invalidated even though the same kind of aid was made available to parents of children attending both public and nonsectarian private schools and even though the aid benefiting the users of sectarian schools was subject to stringent restrictions against its use for religious purposes. For Rutledge, the questions of equal access and no religious use were not dispositive. Instead, he based his decision on whether government aid defrayed any part of the total cost of sectarian education as it did in *Everson*.

The Rutledge option is strong medicine. If applied in the spirit advocated by its author, the Rutledge option would have invalidated most, if not all, of the forms of government aid to sectarian schools that the Court sustained in its post-*Everson* decisions.<sup>156</sup> Only two principal forms of governmental aid would have likely survived under the Rutledge approach: government aid limited to public schools or to students attending public schools, and governmental health, safety, and welfare programs conditioned wholly on non-school related criteria such as the age, residence, or economic status of the recipient. The latter category would have embraced such community-wide forms of service as police and fire protection, which would not have been prohibited merely because some of the recipients attended sectarian schools.<sup>157</sup> However, as

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to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

*Id.* at 45. Accordingly, Rutledge concluded that transportation expenses are clearly part of the total cost burden of educating students in sectarian schools. A governmental program defraying these expenses constitutes, therefore, a prohibited establishment of religion. *See id.* at 45-49.

155. In relation to transportation expenses, Rutledge stressed:

[T]ransportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden.

*Id.* at 47-48. Payment of transportation costs, he argued,

is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. . . . No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure.

*Id.* at 48-49.

156. See Buchanan, *supra* note 3, at 829 for a more detailed discussion of the legal consequences of the Rutledge option.

157. Such expenditures, argued Rutledge,

are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses. The First Amendment does not exclude religious

soon as the governmental aid in question is earmarked to defray any of the cost of education in sectarian schools, the Rutledge option would invalidate it. This option, for example, clearly would have invalidated the Minnesota program sustained in *Mueller* to the extent that tax deductions are specifically made available to users of religious schools.

In a 1978 article, I argued that the Court should discard the *Wolman* option then in use and adopt the Rutledge approach.<sup>158</sup> It was my opinion in 1978, and still is today, that the Rutledge option best advances the meaning and policy behind the establishment clause.<sup>159</sup> In the last decade, however, much conceptual water has gone over the dam, and I am now persuaded that adoption of the views of Justice Rutledge would be impractical because it would defeat entrenched programs of government aid that have been established in reasonable reliance on the Court's post-*Everson* decisions.<sup>160</sup> Instead, I now acquiesce, albeit grudgingly, in the conceptual position that the Court now uses in this area of the law: the total subsidy option. However, to avoid a continuation of its present improper application, I urge that the Court apply this approach more stringently in determining the constitutionality of government aid to religious organizations than it did in the *Mueller* and *Kendrick* decisions.

In the late 1970s the Court began its shift from the then prevailing *Wolman* option to the total subsidy option. The Court's 1976 decision in *Roemer v. Maryland Public Works Board*<sup>161</sup> reflects this shift. In *Roemer*, the Court sustained a Maryland statutory program that provided grants to private colleges, including a significant number of religious institutions. Funding was subject to the restriction that the money not be used for "sectarian purposes."<sup>162</sup> The plurality described the religious

property or activities from protection against disorder or the ordinary accidental incidents of community life. It forbids support, not protection from interference or destruction.

*Everson v. Board of Educ.*, 330 U.S. 1, 61 n.56 (1947) (Rutledge, J., dissenting). "Certainly," acknowledged Rutledge, "the fire department must not stand idly by while the church burns." *Id.* at 61.

158. See Buchanan, *supra* note 3, at 827-38.

159. I am not alone in this position. Justice Douglas was among the *Everson* majority that rejected the Rutledge option in 1947. In a later decision, *Engel v. Vitale*, 370 U.S. 421 (1962), Douglas recanted:

The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy.

*Id.* at 443 (Douglas, J., concurring). For supporters of the Rutledge option, Douglas' recantation can be fairly described as "the shift not made in time to save the nine" from scholarly criticism.

160. The decimating effect of the Rutledge option on post-*Everson* programs of governmental aid is described in detail in my 1978 Article. See Buchanan, *supra* note 3, at 829. Few, if any, of these programs would survive application of the Rutledge option.

161. 426 U.S. 736 (1976).

162. *Id.* at 739.

colleges benefited by the program as not "so permeated by religion that the secular side cannot be separated from the sectarian."<sup>163</sup> The plurality also recognized the student age factor and stressed the greater intellectual maturity and independence of college-age students as contrasted with the more malleable minds of younger students.<sup>164</sup> These three factors convinced the plurality that the Maryland program did not constitute a prohibited establishment of religion.<sup>165</sup>

With respect to government aid to religious colleges, the *Roemer* decision thus embraced the total subsidy position.<sup>166</sup> For a period after *Roemer*, the Court adhered to the *Wolman* option in determining the validity of governmental aid to religious schools at below the college level. In its 1977 *Wolman* decision<sup>167</sup> and its 1980 decision in *Committee for Public Education & Religious Liberty v. Regan*,<sup>168</sup> the Court continued to apply the ad hoc balancing of factors approach that is the hallmark of the *Wolman* option. Even at the pre-college level, however, the dike could not hold against the total subsidy option. In its 1983 *Mueller* decision,<sup>169</sup> the Court abandoned the *Wolman* option and adopted the total subsidy option in a case involving governmental aid to elementary and secondary religious schools. The emergence of the total subsidy position became even more apparent in the *Kendrick* decision.<sup>170</sup> In this non-school aid case, the Court adopted the total subsidy position as the controlling conceptual framework for all cases involving government aid to any religious entity (school or otherwise). After *Kendrick*, it is clear that if the no religious use and equal access conditions of the total subsidy position are met, government aid to a religious entity will be sustained.

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163. *Id.* at 759 (quoting *Roemer v. Maryland Pub. Works Bd.*, 387 F. Supp. 1282, 1293 (D. Md. 1974), *aff'd*, 426 U.S. 736 (1976)).

164. *See id.* at 764.

165. Because the form of governmental aid in *Roemer* involved annual noncategorical grants, the *Roemer* plurality characterized the excessive entanglement prong of the *Lemon* test as presenting a "more difficult" question than the primary effect prong. *Id.* at 761-62. On this aspect of the case, the plurality stressed again the character of the institutions involved in *Roemer*: colleges and universities in which the encouragement of spiritual development is only one secondary objective. *See id.* at 762-65. In light of this lesser emphasis on the inculcation of religious values, the Court concluded that the monitoring of annual grants to these institutions did not create a significant risk of excessive governmental entanglement with religion. *See id.*

166. The program at issue in *Roemer* satisfied the equal access condition because aid was offered to private colleges regardless of any religious affiliation. The express prohibition against use of the aid for religious purposes, the age factor, and the Court's conviction that the secular could be separated from the religious in the sectarian colleges receiving aid convinced the Court that the no religious use condition was also satisfied. The program thus, satisfied the two conditions of the total subsidy option and the *Roemer* Court required nothing more.

167. 433 U.S. 229 (1977).

168. 444 U.S. 646 (1980). In *Regan*, the Court upheld a New York statute that appropriated public funds to reimburse parochial schools for the expense of administering state-prepared examinations. The Court's decision involved the careful balancing of finely-tuned factors in the spirit of the *Wolman* option. *See id.* at 653-61.

169. *Mueller v. Allen*, 463 U.S. 388 (1983).

170. *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

### III. THE TOTAL SUBSIDY POSITION TRIUMPHANT: GENERAL OBSERVATIONS

As discussed in my 1978 article,<sup>171</sup> the total subsidy position has several commendable features. First, it eliminates many of the troublesome questions of degree that afflicted the Court in its application of the *Wolman* option. The dubious distinctions generated by the *Wolman* option largely disappear. As noted earlier, under the total subsidy option, questions concerning the propriety of government aid to religious entities are remitted primarily to the political process. From the judicial perspective, if the aid in question meets the no religious use and equal access restrictions of the total subsidy position, the Court will routinely approve it. Conceptually, therefore, the total subsidy position enhances predictability in the establishment clause area because judicial approval of nearly all forms of government aid to religious entities is a foregone conclusion.

The total subsidy position also possesses a type of integrity that matches conceptual application with functional result. The total subsidy position does not attempt to conceal the consequences which result from its application. It proceeds bluntly on the premise that government has the constitutional power to aid any secular function of religious organizations through broad and recurring noncategorical grants. Under the total subsidy position, as applied in *Mueller* and *Kendrick*, the Court avoids a debilitating inquiry into the nature and quality of the aid that government provides to religious entities; judicial review is confined to a loose policing of the no religious use and equal access conditions of that position. Thus, the conceptual framework of the total subsidy position is ideally suited to produce the intended functional result: court approval of nearly all forms of government aid to religious entities.<sup>172</sup>

The total subsidy option also has a strong equitable appeal. Parents who send their children to sectarian schools do, to some extent, bear a double economic burden. The existence of this burden was readily conceded, and its nature aptly described, by Justice Rutledge in his *Everson* dissent:

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not

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171. See Buchanan, *supra* note 3, at 822-27.

172. "Intended functional result" refers to the result intended by those persons, be they judges, legislators, scholars, or otherwise, who favor a construction of the establishment clause that permits generous government aid to religious entities. For various policy reasons, such people support generous government funding of the secular activities of religious organizations and are happy to embrace a construction of the establishment clause that permits this funding.

demand.<sup>173</sup>

To the extent that government subsidizes the cost of secular education in religious schools, the burden described by Rutledge would be eliminated.

As a final argument in its favor, the total subsidy option enhances the educational choices of parents and children by enabling generous government funding of the secular educational activities of private schools, both sectarian and nonsectarian. That funding facilitates the growth of all private schools, thereby contributing to a healthy and competitive pluralism in the nation's educational system.<sup>174</sup> Proponents of the total subsidy option argue persuasively that sectarian schools "uniquely contribute to the pluralism of American society by their religious[ly oriented educational] activities."<sup>175</sup> Hence, government aid to sectarian schools "contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."<sup>176</sup> Outside of the school context, the *Kendrick* majority used this support of pluralism argument in sustaining a program of government aid to religious organizations offering counsel and advice to adolescents on matters of teenage sexuality. As viewed by the majority, these recipients were merely part of a broader spectrum of recipients, both public and private, each contributing in unique and diverse ways to the resolution of an urgent national problem.<sup>177</sup>

Despite its positive features, the total subsidy option is seriously flawed. It may exacerbate political division along religious lines, one of the primary dangers that the establishment clause was intended to avoid.<sup>178</sup> The practical effect of the total subsidy position is to eliminate

173. *Everson v. Board of Educ.*, 330 U.S. 1, 58 (1947).

174. In the related area of tax exemptions for property devoted to religious use, Justice Brennan, in his concurring opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970), extolled the virtue of pluralism in these words:

[G]overnment grants [tax] exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.

*Id.* at 689.

175. *Id.*

176. *Id.*

177. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2571-74 (1988).

178. As Justice Rutledge stated in his dissent in *Everson*:

The reasons underlying the [First] Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will

almost all remaining constitutional restraints on governmental aid to religious entities, thereby remitting to the political process all significant questions pertaining to the nature and extent of such aid. This, in turn, may encourage religious entities to pursue their funding requests more aggressively in Congress and in the state legislatures. The Court persuasively set forth the dangers of increased political division along religious lines in *Lemon v. Kurtzman*:

The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.<sup>179</sup>

By easing the constitutional restraints on government aid to religious organizations, the total subsidy position promotes the evils so aptly described in *Lemon*.

The total subsidy option may also accelerate a trend more damaging than political division along religious lines: the deterioration of the quality of education in public schools. Many observers believe that the American system of public education is in deep trouble, and that the quality of education in public schools, as reflected in student attitudes and performance, is spiraling downward.<sup>180</sup> A significant cause of this alarming trend is the lack of adequate financial resources. In the present political climate, citizens are reluctant to tax themselves at the level required for quality public education.<sup>181</sup> Moreover, spreading community indifference to the plight of public education inhibits necessary remedial

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benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.

*Everson v. Board of Educ.*, 330 U.S. 1, 53-54 (1947) (citations and footnotes omitted).

179. *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971) (citation omitted).

180. See Tift, *Who's Teaching Our Children?*, Time, Nov. 14, 1988, at 58; *High Schools Under Fire*, Time, Nov. 14, 1977, at 62. Indeed, President Bush recently convened a summit to discuss the nation's education problems with the state governors. See Weinraub, *Hope and Dissent Blend in Education Conference*, N.Y. Times, Sept. 28, 1989, at B13, col. 1. The summit concluded with an agreement to create national goals aimed at "eliminating illiteracy, reshaping curriculums and holding teachers accountable for their performance." Weinraub, *Bush and Governors Set Education Goals*, N.Y. Times, Sept. 28, 1989, at A10, col. 1.

181. See, e.g., Weinraub, *Hope and Dissent Blend in Education Conference*, N.Y. Times, Sept. 28, 1989, at B13, col. 2 (few called for more federal financial aid to schools at recent education summit).

action. This indifference increases as more parents elect to send their children to private schools.

Taxpayer reluctance to support public education will almost certainly intensify under the total subsidy option. To the extent that government subsidizes the cost of secular education in sectarian schools (and of education in nonsectarian private schools generally), the financial burden of sending children to such schools is lessened. If, under the total subsidy position, government aids private schools with substantial and recurring noncategorical grants, can it be doubted that increasing numbers of parents would send their children to private schools? And, as parents exercise that option, can it be doubted that their sense of commitment to public education would lessen appreciably? While loss of commitment to public education is impossible to quantify, it is realistic to assume that the total subsidy option will discourage taxpayer support of public education. This tendency to encourage taxpayer apathy toward the plight of public education represents a major policy weakness in the total subsidy position, a weakness not adequately addressed by the growth-of-pluralism argument discussed earlier.

The total subsidy option, therefore, earns mixed reviews. On balance its negative features outweigh its positive features. Conceptually, it is a position difficult to square with the maintenance of a "high and impregnable"<sup>182</sup> wall between church and state. If, in this area, the Court were writing on a blank slate, I would oppose a conceptual position that permits government, at its option, to bear a substantial part of the financial burden of running the church-related schools of the nation. The Court, however, is now encumbered by its decisions in the post-*Everson* era, in which it moved, almost ineluctably, to its current total subsidy position. In that context, I accept the total subsidy position as a "necessary evil" and turn to the task of describing how it can be most fairly and effectively applied to promote establishment clause values.

#### IV. CABINING THE TOTAL SUBSIDY POSITION

If, like the man who came to dinner, the total subsidy position is here to stay,<sup>183</sup> it ought to be applied in a way that preserves meaningful constitutional restraints on government aid to religious entities. It should not be applied in a way that constitutes a total abdication to the political process. The dissenting opinions in *Mueller* and *Kendrick* show the way.

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182. Justice Black uses this phrase in his majority opinion in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

183. *The Man Who Came To Dinner*, written by George Kaufman and Moss Hart, is a play about a seemingly harmless dinner invitation which leads to a lengthy visit. The guest, a famous radio personality, falls and fractures his hip and must stay in his hosts' home as he recovers. The obnoxious visitor spends a lengthy recuperation period in his hosts' home during which he meddles in their affairs and becomes a nuisance. When he is finally prepared to leave, the "dinner guest" falls and injures himself again. One begins to get the feeling that this man who came to dinner may never leave. Similarly, there is no sign that the total subsidy option will disappear any time in the near future.

Within the liberal framework of the total subsidy position, there is still some room for the application of safeguards that can effectively preserve establishment clause values.

Courts may employ either strict or relatively loose applications of the no religious use and equal access restrictions of the total subsidy position. If the restrictions are applied loosely, questions concerning the propriety of governmental aid to religious entities will be left, in large measure, to the political process for resolution. If applied tightly, the courts can still play a significant role in determining the constitutional validity of such aid. More fundamentally, if the restrictions of the total subsidy position are tightly applied, the courts will be better able to advance what Justice O'Connor has persuasively argued is the main purpose of the establishment clause: to prohibit "government from making adherence to a religion relevant in any way to a person's standing in the political community."<sup>184</sup> As noted by O'Connor:

Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>185</sup>

If applied firmly, the equal access and no religious use restrictions are well suited to protect against the two dangers described by O'Connor and safeguard the fundamental values protected by the establishment clause.

#### A. *The Equal Access Restriction: Legal Formalism Versus Economic Reality*

If a legal formalism approach is taken with respect to the equal access restriction, it will provide few safeguards for establishment clause values. Under the legal formalism approach, the Court would inquire only into the legal structure of challenged government aid, and not into the practical reality of its economic effect. Viewed formally, when governmental aid is offered on substantially the same terms to both religious and non-religious entities, the equal access condition is satisfied. If the legal structure of the aid program creates equal access for the users of both religious and nonreligious entities, it does not matter that the economic benefits of the program flow primarily, or even overwhelmingly, to the

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<sup>184</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

<sup>185</sup> *Id.* at 687-88 (citations omitted). See Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. Rev. 491 (1988), for a thoughtful and persuasive development of the "outsider" theme advanced by O'Connor in her *Lynch* opinion.

users of religious institutions.<sup>186</sup>

The Rehnquist majority opinion in *Mueller* is the paradigmatic example of the legal formalism approach to equal access.<sup>187</sup> Viewed solely from the perspective of legal structure, the Minnesota aid program offered the same income tax deductions to users of both religious and non-religious schools. For the *Mueller* majority, this satisfied the equal access condition.<sup>188</sup> And, as noted earlier, the *Mueller* majority expressly refused "to engage in [an] empirical inquiry into those persons benefited by"<sup>189</sup> the Minnesota program.

The *Mueller* Court's legal formalism approach strips the equal access requirement of meaning. As a technical matter of legal right, government can almost always phrase a program of aid to provide equal access to users of both religious and nonreligious entities, even if the program, in practical terms, favors the users of religious entities. Thus, the legal formalism approach provides no real safeguard against a program of governmental aid that has the primary economic effect of supporting religious entities or their users.

The equal access condition can operate effectively to preserve establishment clause values only under an approach which weighs the economic realities of a particular program of government aid. Under this approach, as employed by Marshall's dissent in *Mueller*,<sup>190</sup> the Court would make the empirical inquiry that the *Mueller* majority declined to make. The Court would examine the actual operation of a challenged program to determine its practical economic effect. If that effect provides only a minimal benefit for nonreligious entities or their users and a substantial benefit for religious entities or their users, the challenged program would be held not to satisfy the equal access condition. In terms of the *Lemon* test, the program would be held to have a primary effect that advances religion.

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186. The distinction described in the text between legal formalism and substantive reality manifests itself in many areas of the law. Cases involving the construction and application of federal tax laws are particularly illustrative. For example, in *Morsman v. Commissioner of Internal Revenue*, 90 F.2d 18 (8th Cir.), *cert. denied*, 302 U.S. 701 (1937), the Eighth Circuit considered the validity, for federal income tax purposes, of a trust in which the settlor, at the time of the trust's creation, was the sole trustee and sole living beneficiary of the trust. In holding that the trust was not a valid trust for tax purposes, the court stated:

It is true that a legal transaction will not be denied its intended effect though an underlying motive may have been the evasion of taxes. But the transaction may always be scrutinized to see whether it is in reality what it appears to be. Substance and not form should control in the application of tax laws.

*Id.* at 22 (citations omitted). In a 1921 case, the Supreme Court stated that "[w]e recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder." *United States v. Phellis*, 257 U.S. 156, 168 (1921).

187. *See Mueller v. Allen*, 463 U.S. 388 (1983).

188. *See id.* at 397-99.

189. *Id.* at 402.

190. *See id.* at 404.

This emphasis on economic reality is necessary because it protects against the dangers of entanglement and endorsement described by O'Connor in her concurring opinion in *Lynch*.<sup>191</sup> Requiring that a program of government aid provide a substantial economic benefit for users of nonreligious entities is a practical safeguard which reduces the likelihood of excessive governmental entanglement with religious institutions.<sup>192</sup> Such a requirement would also lessen the likelihood that the program will be motivated by an official purpose to endorse religion or that it will be perceived as an endorsement of religion by objective observers. When government aid is actually dispensed to a broad spectrum of organizations, some religious and some nonreligious, the dangers of entanglement and endorsement attenuate, and establishment clause values become more secure. For these reasons, it is important to make an inquiry into practical economic effect the touchstone of the equal access condition.

From the perspective of economic reality, the program of aid considered in *Everson* did meet the equal access restriction of the total subsidy position. The challenged program provided substantial economic benefits to users of both religious and nonreligious entities since both groups incurred costs in transporting their children to school. Not surprisingly, therefore, New Jersey's action in reimbursing parents for the costs of transporting their children to accredited schools, whether religious or nonreligious, created little practical danger of entanglement or endorsement. On this point, the distinction between the *Everson* and *Mueller* programs is abundantly clear, and it is that distinction that the Court should recognize in its policing of the equal access condition. Judged in terms of economic reality, the *Everson* and *Mueller* programs represent the conceptual paradigms at opposite ends of the equal access spectrum.

Before leaving the economic reality inquiry, it is important to tie this inquiry to the primary effect prong of the *Lemon* test. Admittedly, it is difficult to discern whether a government program has the primary effect of advancing or inhibiting religion.<sup>193</sup> For example, there is no way to measure with precision the "endorsing effect" of the programs sustained in *Mueller* and *Kendrick*. We can, however, determine whether, in practical economic terms, a program of governmental aid is tailor-made for religious institutions or their users. If, as in *Mueller*, users of religious

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191. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

192. There are usually many beneficiaries of a government program providing substantial aid to both religious and nonreligious organizations or their users. In such a program, each category of recipients guards against an administrative mechanism that would encourage or permit excessive government entanglement with any one category of recipients. This practical safeguard is not present in programs in which the only recipients of substantial economic aid are religious entities or their users.

193. The *Kendrick* majority conceded the difficulty of discerning primary effect: "As usual in Establishment Clause cases, the more difficult question is whether the primary effect of the challenged statute is impermissible." *Bowen v. Kendrick*, 108 S. Ct. 2562, 2571 (1988) (citation omitted).

institutions are the only recipients of significant economic benefits under a program of government aid, the conclusion that the challenged program has the primary effect of endorsing religion should follow as a matter of law. The conclusion of endorsing effect flows from the established reality of economic benefit.

Even primary economic effect may be difficult to discern in some cases. This, however, is one of those perpetually recurring questions of degree that the legal system handles regularly.<sup>194</sup> In some cases, as in *Mueller*, it is abundantly clear that only users of religious institutions are receiving significant economic benefits under the challenged program of government aid. As we move along the continuum from *Mueller* to government programs in which secular organizations and their users also receive significant economic benefits, the program's "endorsing religion" effect is blunted and an objective observer would be less likely to perceive the program as an endorsement of religion.<sup>195</sup> And, as a program's endorsing effect lessens, the Court should be less ready to hold that a program has the primary effect of advancing religion. Thus, an empirical inquiry into economic effect is justified by the tie between that effect and perceived endorsement in the eyes of an objective observer.<sup>196</sup>

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194. "The law is not indifferent to considerations of degree." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). This sensitivity to questions of degree was evidenced in the concurring opinion of Justice Powell in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court refused to extend the right of privacy to protect the private sexual conduct of two homosexual males and sustained the validity of a Georgia law making such conduct a crime. While concurring in the Court's opinion, Powell reserved for later consideration the question of punishment under the Georgia statute. He noted that "[u]nder the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first-degree arson, and robbery." *Id.* at 197-98 (citations omitted). In Powell's opinion, a sentence of "long duration" under the Georgia statute "would create a serious Eighth Amendment issue." *Id.* at 197.

195. The governmental program sustained in *Kendrick* is an example of a program in which "[f]unding has gone to a wide variety of recipients, including state and local health agencies, private hospitals, community health associations, privately-operated health care centers, and community and charitable organizations." *Kendrick*, 108 S. Ct. at 2568. As stressed in the text, the problem with the *Kendrick* program stems from the no religious use condition of the total subsidy position.

196. In establishment clause cases, the concept of the "objective observer" has its main roots in the concurring opinion of Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984). In the application of the primary effect prong of the *Lemon* test, O'Connor argued that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Id.* at 692. Shortly thereafter, in her concurring opinion in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), O'Connor distinguished the constitutionally invalid exemption for religious practices granted in the state law before the Court from the exemption for religious practices that Title VII permits in its provisions prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. With respect to Title VII, O'Connor stated:

[A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement

### B. *The No Religious Use Restriction*

In *Kendrick*, the dissent applied the no religious use restriction more stringently than did the majority. As discussed above, the dissent found three factors to be of special relevance in determining whether the no religious use restriction was satisfied: the actual recipient of the aid,<sup>197</sup> the age of those targeted by the programs,<sup>198</sup> and the nature of the service supported.<sup>199</sup> The dissent concluded that all three factors operated against the validity of AFLA, the government program challenged in *Kendrick*.<sup>200</sup> The *Kendrick* majority acknowledged the relevance of these factors, but applied them so leniently as to deprive them of any significant restraining force.

Under the facts of *Kendrick*, each of the religious use factors mentioned above creates a strong reason to find that AFLA violates the establishment clause. With respect to the aid recipient factor, the fact that AFLA grants are given directly to religious entities rather than to the users of those entities increases the likelihood that the grants would be used impermissibly. With respect to the age factor, the counseling services supported by AFLA grants are directed at impressionable, pre-college age adolescents. Finally, and perhaps most significantly, the AFLA-supported counseling services are highly susceptible to ideological bias and manipulation in the hands of those rendering the services. As stressed by Justice Blackmun in his *Kendrick* dissent, counseling adolescents on matters of teenage pregnancy and sexuality is not like running a soup kitchen for the general public.<sup>201</sup>

With the religious use factors operating so strongly against the validity of AFLA, it is hard to understand the *Kendrick* majority's conclusion that AFLA does not violate both the primary effect and entanglement prongs of the *Lemon* test. The primary effect of AFLA grants to religious organizations is clearly to support moral guidance services highly

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to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

*Id.* at 712 (citation omitted). Finally, in the recent case of *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989), the Court, in an opinion written by Justice Blackmun, joined in part by Justice O'Connor, used the reasonable or objective observer concept previously advanced by O'Connor. *See id.* at 3102. In *Allegheny*, the county government displayed, at government expense, a creche scene in the county courthouse; the creche display did not contain any other significant nonreligious decorations. *See id.* at 3093-94. In light of its practical isolation, the Court stated that "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *Id.* at 3104.

197. *See Bowen v. Kendrick*, 108 S. Ct. 2562, 2587-88 (1988) (Blackmun, J., dissenting).

198. *See id.* at 2589-90.

199. *See id.* at 2590-91.

200. *See supra* notes 111-130 and accompanying text.

201. *See Bowen v. Kendrick*, 108 S. Ct. 2562, 2591 (1988) (Blackmun, J., dissenting).

susceptible to religious indoctrination. With respect to the entanglement prong, government surveillance of an ongoing and deeply intrusive nature would be required to ensure that counseling services provided by such organizations are not used to transmit religious values and tenets to the malleable minds of youth. Setting aside hypothetical situations that approach the absurd, it is hard to imagine a program of governmental aid that more readily fosters an excessive entanglement between church and state than the AFLA program challenged in *Kendrick*.

Like the equal access condition of the total subsidy option, the no religious use condition is designed to protect against the dangers of entanglement and endorsement described by Justice O'Connor in *Lynch*.<sup>202</sup> If applied strictly, as it was by the *Kendrick* dissenters, the three religious use factors will enable the Court to determine when the danger of religious use is real. The nature of the service supported factor is an example; if government dollars are supporting the moral guidance services of a religious entity, the twin dangers of entanglement between church and state and of endorsement of religion are palpably present. In such instances, something approaching a per se rule of invalidity is called for. This is particularly true when, as in *Kendrick*, all three religious use factors strongly indicate that the governmental action in question is invalid.

#### CONCLUSION

The total subsidy position cannot perform miracles in the defense of establishment clause values. Even if its two restrictions are stringently applied, it permits government to provide substantial amounts of aid to religious entities; the level of that aid becomes largely a question for the political process to resolve. Moreover, government dollars which support the secular activities of religious entities enable those organizations to support their religious activities with other funds.<sup>203</sup> The total subsidy option cannot prevent that reality from occurring. Only the Rutledge option would have been equal to that task, and, for reasons already discussed, it is too late to adopt that approach.

While it does not prevent government dollars from releasing nongovernment dollars to support religious activities, the total subsidy position, if applied in the manner of the *Mueller* and *Kendrick* dissents, can reduce the risks of entanglement between church and state and endorsement of religion by government. For supporters of the Rutledge option, this may seem to be a hollow victory. It is better, however, than the approach of the majority opinions in *Mueller* and *Kendrick* which

202. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

203. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court readily acknowledged this reality:

[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

*Id.* at 743.

provide no practical restraints to protect establishment clause values. If the total subsidy option is to have the practical restraining force required to protect the values embodied in the establishment clause, its equal access and no religious use restrictions must be applied with vigor, with a view to economic and ideological reality. Anything less amounts to an ill-advised judicial abdication to the political process in this vital area of constitutional law.

