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Establishing Bonds between Church and State: The Issuance of Tax-Exempt Bonds for Religious Institutions

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ESTABLISHING BONDS BETWEEN CHURCH AND STATE: THE ISSUANCE OF TAX-EXEMPT BONDS FOR RELIGIOUS INSTITUTIONS

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Tax-exempt revenue bonds can raise Establishment Clause issues when they are used to assist sectarian institutions. Recent cases indicate that their use to finance houses of worship and other religious projects presents less of a constitutional concern than previous Supreme Court precedent may have suggested. Because tax-exempt bond issues require specific approval by the government, they can convey the message of government endorsement or support of the sectarian institutions they benefit. For that reason, bond programs should be crafted to avoid Establishment Clause questions in this unique area of public-private sector relations.

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I. INTRODUCTION

This article will consider whether the Establishment Clause[1]

1. The First Amendment provides, in part, "Congress shall make no law respecting an establishment of religion" (the "Establishment Clause") or "prohibiting the free exercise thereof" (the "Free Exercise Clause"). U.S. CONST. amend. I. The Establishment Clause and the Free Exercise Clause are among the provisions that the Fourteenth Amendment to the U.S. Constitution makes applicable to the states and their political subdivisions. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

prohibits the issuance of tax-exempt bonds by a local government for the purpose of financing construction of religious facilities for churches, synagogues, temples, mosques, or other pervasively sectarian institutions. Historically, courts have rested validation of tax-exempt bonds for religious institutions on *Hunt v. McNair*,[2] a United States Supreme Court case upholding the issuance of tax-exempt bonds for a sectarian college.[3] In *Hunt* the Court based its decision on the grounds that the benefited institution was not pervasively sectarian and that the bond financing statute fulfilled a secular educational purpose.[4] A recent Sixth Circuit Court of Appeals decision, *Steele v. Industrial Development Board*,[5] upset this traditional view of tax-exempt financing for religious institutions by upholding a governmental authority's issuance of tax-exempt bonds for the benefit of a pervasively sectarian university.[6]

As a result of the court's reasoning in *Steele*, it is likely that a religious institution will request that a local government issue tax-exempt bonds to finance construction of a sanctuary or other religious building or improvement. The validity of the bond issue will be tested in the courts.[7] This article addresses the issues a court

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2. 413 U.S. 734 (1973).

3. *See generally* Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 510 (upholding the constitutionality of tax-exempt bonds issued to finance the construction of school buildings for a sectarian school).

4. *Hunt*, 413 U.S. at 743–44.

5. 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003).

6. "A pervasively sectarian institution is one whose religious functions cannot be separated from its non-religious functions." *Johnson*, 241 F.3d at 510. The district court in *Steele v. Industrial Development Board*, 117 F. Supp. 2d 693, 706 (M.D. Tenn. 2000), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003), held that a government instrumentality's issuance of tax exempt conduit revenue bonds for the benefit of a pervasively sectarian university violated the Establishment Clause. *Id.* at 734. The Sixth Circuit did not reject the district court's finding that the university was pervasively sectarian. *See Steele*, 301 F.3d at 407–09.

7. *See, e.g.*, TEX. GOV'T CODE ANN. § 1205.021 (Vernon 2003) (authorizing the issuer of public securities to bring an action to obtain a declaratory judgment as to the legality and validity of the public securities); State *ex rel.* Saxbe v. Brand, 197 N.E.2d 328, 329 (Ohio 1964) (resolving a quo

will confront in considering validation of such bonds, including establishing a public purpose for the issue and avoiding Establishment Clause constraints. This article will assert that the Supreme Court Justices' recent analyses of Establishment Clause issues[8] indicate that, because of the nature of the government aid in a tax-exempt financing, the Supreme Court would uphold the validity of such bonds, if the Justices overcame concerns about the appearance of government support for favored religious institutions.[9] This article will discuss whether this apparent government approval is superficial, having no legal consequence, or whether tax-exempt financing of religious facilities for pervasively sectarian institutions remains impermissible under the Establishment Clause. It will suggest principles that may trouble the Justices in considering the issues and discuss difficulties that could result from the Court's adoption of the *Steele* court's analysis. The article will conclude with cautions to courts and public officials about embracing *Steele*'s logic and will suggest ways to overcome the objections.

Tax-exempt conduit revenue bonds are obligations issued by governments and government instrumentalities in order to make loans to private entities to fulfill public purposes. State legislatures have enacted statutes authorizing the issuance of revenue bonds to finance improvements for hospitals, universities, primary and secondary schools, museums, theaters, and other nonprofit entities[10]

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warranto challenge to the authority of a public body to issue bonds to finance a project for a private corporation).

8. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Mitchell v. Helms, 530 U.S. 793, 809–14 (2000); discussion *infra* Section III(B)(1).

9. The flaws in the current Court's Establishment Clause analysis have been treated elsewhere and will not be examined here. *See, e.g.*, Erwin Chemerinsky, *Why the Rehnquist Court is Wrong About the Establishment Clause,* 33 LOY. U. CHI. L.J. 221, 222 (2001) (criticizing the increasingly "accommodationist" approach of four of the current Justices toward the Establishment Clause).

10. JUDY WESALO TEMEL, THE FUNDAMENTALS OF MUNICIPAL BONDS 59–60 (5th ed. 2001). Other statutes authorize the issuance of tax-exempt bonds to finance manufacturing facilities, pollution control facilities, and industrial projects for private or government entities. TEMEL, *supra* at 61–62; *see, e.g.*, OHIO REV. CODE §§ 165.01–.20 (2002) (pertaining to the issuance of

whose projects will benefit the public.[11] Legislatures have designed these statutes to take advantage of federal laws that exempt interest on obligations of governments from federal income taxation.[12] The government acts as a conduit between the private borrowers and individual and institutional lenders who purchase the bonds. Interest paid to bond owners is exempt from federal,[13] state, and local income taxes, provided that the bonds meet federal and state statutory constraints.[14] To reassure bond owners that a bond issue fulfills these legal conditions, lawyers known as "bond counsel" deliver opinions confirming the validity and tax-exempt status of the bonds.[15] Among other federal tax law requirements, the bonds

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industrial development revenue bonds for industry, commerce, distribution, and research).

11. For example, Chapter 221 of the Texas Health and Safety Code pertains to financing of projects for hospitals, nursing homes, and other health care agencies. TEX. HEALTH & SAFETY CODE ANN. §§ 221.001–.104 (Vernon 2003) (governing health facilities development corporations and the issuance of bonds to finance health care projects).

12. TEMEL, *supra* note 10, at 206.

13. With certain exceptions, gross income for federal income tax purposes does not include interest on any obligation of a state, including the District of Columbia and any possession of the United States, or political subdivision thereof. 26 U.S.C. § 103(a) (1994). In addition to this statutory exemption for obligations of states and political subdivisions, revenue rulings of the Internal Revenue Service allow issuance of tax-exempt bonds by public corporations or nonprofit corporations acting on behalf of political subdivisions for specified public purposes, provided certain conditions are met. Rev. Rul. 63-20, 1963-1 C.B. 24; Rev. Rul. 57-187, 1957-1 C.B. 65.

14. *See, e.g.*, S.C. CODE ANN. § 12-6-1120(1) (Law. Co-op 1976) (exempting interest on state and federal bonds from gross income for state income tax purposes). *Hunt v. McNair*, 413 U.S. 734, 739 n.3 (1973) cites a predecessor to this provision.

15. As explained in FUNDAMENTALS OF MUNICIPAL BONDS:

> Essentially every municipal security is accompanied by an opinion of *bond counsel*. . . . That opinion addresses the main legal issues: that the bonds constitute legal, valid, and binding obligations of the issuer, and that interest on the bonds is exempt from federal income taxation under applicable tax laws. In rendering the opinion, bond counsel (1) undertakes a review and examination of all applicable laws authorizing the issuance of securities, (2) ascertains that all required procedural steps have been

must be issued by or on behalf of a state or local governmental unit. The legislative body of the governmental unit issuing the bonds, such as a city council or the board of directors of a nonprofit corporation acting on behalf of a local government, authorizes the issuance of the bonds. In addition, either an elected official of the jurisdiction in which the project is located, or the voters in that jurisdiction must approve the bond issue.[16] Because interest on the

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> completed to assure proper authorization and issuance of the securities, and (3) determines that all federal tax laws governing the issuance of the bonds [have been satisfied].

TEMEL, *supra* note 10, at 10. Comment H to the MODEL BOND OPINION REPORT of the National Association of Bond Lawyers (NABL), Committee on Opinions and Documents, dated February 14, 2003, provides:

> Bond counsel may render an "unqualified" opinion regarding the validity and tax exemption of bonds if it is firmly convinced (also characterized as having "a high degree of confidence") that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion.

NAT'L ASS'N OF BOND LAWYERS, MODEL BOND OPINION REPORT 7 (2003), *available at* http://www.nabl.org/library/comments/MBO/MBopinion.pdf. Under the Supreme Court's current Establishment Clause jurisprudence, the NABL standard cannot be met with respect to the issuance of tax-exempt bonds to finance religious improvements. For discussions by practicing bond lawyers of the issuance of bonds for this purpose, see David A. Caprera & Milton S. Wakschlag, Letters to the Editor, BOND LAW., Mar. 1, 2002 at 50–52; Griffith F. Pitcher, Steele *Reversed*, BOND LAW., Sept. 1, 2002, at 42; Griffith F. Pitcher, *Pray to Play Revisited*, BOND LAW., June 1, 2002, at 23; Griffith F. Pitcher, *Pray to Play?—Perhaps the Establishment Clause Does Not Prohibit the Financing of Places of Worship with Conduit Bonds*, BOND LAW., Dec. 1, 2001, at 30; Dean A. Spina, *Hail Mary Pass or an End-Around?*, BOND LAW., Mar. 1, 2002, at 49–50.

16. 26 U.S.C. § 147(f) (1994). Because Congress enacted the requirement for applicable elected official or voter approval in The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 2154, 96 Stat. 324, 468 (1982) (codified as 26 U.S.C. § 147(f)(2)(B)), the requirement is referred to as "TEFRA approval." A public hearing must precede approval by the applicable elected representative. 26 U.S.C. § 147(f)(2)(B) (1994). The public hearing must follow published notice reasonably designed to inform residents of the governmental issuer and of the

bonds is tax-exempt, lenders are willing to buy bonds bearing a lower rate of interest than that borne by bonds bearing interest subject to taxation. This income tax benefit for the lender reduces the interest costs the borrower must pay. Bonds are payable solely from revenues of the benefited institution and are never payable from taxes levied by the issuing government instrumentality, the state or any political subdivision of the state, or any other public funds.

These characteristics of tax-exempt conduit revenue bonds are significant to an analysis of Establishment Clause questions. To aid the examination, this article will describe one well-recognized framework the Supreme Court has used to resolve Establishment Clause issues, as set forth in *Lemon v. Kurtzman*[17] and modified by *Agostini v. Felton*.[18] It will then delineate the traditional Establishment Clause analysis of tax-exempt financing, beginning with *Hunt v. McNair*.[19] It will discuss an alternative explanation for the holding in *Hunt* that the *Steele* court embraced.[20] This article will then structure and assess an argument to justify the issuance of tax-exempt bonds for religious institutions applying the *Lemon-Agostini* guidelines and using the *Steele* analysis. The discussion also will examine two other Establishment Clause tests that members of the Supreme Court have enunciated, whether a government practice improperly endorses religion[21] or improperly coerces a citizen to support religion.[22]

A discussion of the current principles of Establishment Clause analysis of tax-exempt financings under *Hunt*, *Lemon*, and *Agostini*, and the structure of the argument that *Steele* suggests, are

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governmental unit where a facility is to be located of the proposed issuance. 26 C.F.R. § 5f.103-2(g)(3) (2003).

17. 403 U.S. 602 (1971).

18. 521 U.S. 203 (1997).

19. 413 U.S. 734 (1973).

20. As discussed below in Section II(B), the Supreme Court identified this line of reasoning in *Hunt* but declined to rely upon it.

21. *See* Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 705 (M.D. Tenn. 2000), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003).

22. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655–56 (2002).

set forth below.

II. THE FRAMEWORK FOR ANALYSIS

A. *The* Lemon-Agostini *Guidelines*

Modern examinations of the Establishment Clause begin with Justice Black's opinion in *Everson v. Board of Education*,[23] in which he asserted, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "[24] Justice Black's formulation has been modified by judges who focus on the neutrality of a particular government action, insisting that religious institutions be treated in the same manner as nonreligious institutions.[25] To aid the analysis, Supreme Court jurisprudence has established certain "helpful signposts"[26] for evaluating a statute under the Establishment Clause. *Lemon*,[27] as modified by *Agostini*,

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23. 330 U.S. 1 (1947). "The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson*, which inaugurated the modern era of establishment doctrine." *Zelman*, 536 U.S. at 686–87 (Souter, J., dissenting) (citation omitted).

24. *Everson*, 330 U.S. at 15 (citation omitted).

25. For a discussion of this perspective, see *infra* Section III(B)(1) (examining Mitchell v. Helms, 530 U.S. 793, 809–14 (2000) (plurality opinion)). Also, see Justice Souter's summary of the history of the Court's jurisprudence regarding government aid to religious schools in his dissent in *Zelman*, 536 U.S. at 688–96 (Souter, J., dissenting).

26. Hunt v. McNair, 413 U.S. 734, 741 (1973).

27. In *Lemon*, the Court invalidated statutes under which the state provided funds to support secular education at nonpublic schools. Lemon v. Kurtzman, 403 U.S. 602, 607–11. The Court held that the statutes resulted in excessive entanglement between church and state because they required excessive monitoring of religious schools to ensure that money was not spent on sectarian activities. *Id.* at 619–22. Members of the Court have expressed discomfort with the *Lemon* test and in some cases have not applied the test. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319–20 (2000) (Rehnquist, J., dissenting); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (identifying cases that have criticized or ignored *Lemon*). In spite of these criticisms of the *Lemon-Agostini* tests, this article will use the guidelines as a constructive method for organizing the discussion of tax-exempt financing for religious

delineates the following tests to establish the constitutionality of a statute under the Establishment Clause:

(1) the statute must have a secular legislative purpose,[28] and
(2) the statute may not have a primary effect of advancing or inhibiting religion.[29]

Government aid has the effect of advancing religion if it:

(a) results in governmental indoctrination,[30]
(b) defines its recipients by reference to religion,[31] or
(c) creates an excessive entanglement.[32]

Excessive entanglement involves the consideration of:

(i) the character and purposes of the institution benefited,
(ii) the nature of the aid the state provides, and
(iii) the resulting relationship between government and religious authority.[33]

The Court initially established these guidelines to "draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[34] Applying these standards and from time to time using other analyses, Supreme Court decisions have upheld the use of government moneys to support sectarian institutions in numerous instances.[35]

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institutions.

28. Agostini v. Felton, 521 U.S. 203, 218 (1997).

29. *Id.* at 222–23.

30. *Id.* at 219.

31. *Id.* at 230–31.

32. *Id.* at 232–33.

33. *Id.* at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).

34. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

35. *See generally* Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 406 n.3, *cert. denied*, 537 U.S. 1188 (2003) (cataloging cases in which the Supreme Court found that the government aid programs at issue were constitutional).

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), for example, the Court allowed expenditure of public funds to pay a sign language interpreter for a deaf child in a religious secondary school. *Board of*

B. *The Holding in* Hunt *and the* Steele *Alternative*

The Supreme Court applied the *Lemon* test in *Hunt* to uphold the issuance of tax-exempt bonds for a religiously affiliated college. After determining that the statute authorizing the issuance of bonds for institutions of higher education had a secular purpose, the Supreme Court asked whether the issuance of tax-exempt bonds under the statute for the benefit of a sectarian college had a primary effect of advancing religion.[36] The Supreme Court defined "primary effect" as follows:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[37]

The Supreme Court held that the primary effect of the assistance afforded to the college was neither to advance nor to inhibit religion, but rather, to support secular projects. It reached this determination as a result of its conclusion that the college was not pervasively sectarian.[38] The Court also emphasized that the

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Education v. Allen, 392 U.S. 236 (1968), allowed the loan of publicly funded textbooks to students in religious schools. *Everson v. Board of Education*, 330 U.S. 1 (1947), held that reimbursing parents for the cost of bus transportation to religious schools was constitutional.

36. Hunt v. McNair, 413 U.S. 734, 742–45 (1973). In *Hunt*, the borrowing was effected by a transfer of the project being financed to the governmental authority and a lease of the project to the college. Rental payments under the lease were pledged to the payment of the bonds and matched the debt service on the bonds. *Id.* at 738. Other statutes, for example, TEX. HEALTH & SAFETY CODE ANN. § 221.030(a)(5) (Vernon 2003), authorize a government instrumentality to lend bond proceeds to private institutions for use in constructing improvements pursuant to a loan agreement, without conveyance and leaseback of the project.

37. *Hunt*, 413 U.S. at 743.

38. The record showed that there were no religious qualifications for faculty membership or student admission and only 60% of the college's student body was Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. The Court equated the college to

college could not use projects financed with the proceeds of the tax-exempt bonds for religious activities.[39] In a later case describing *Hunt*, the Court said that *Hunt* required "(1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded."[40]

Notwithstanding *Roemer*'s characterization of its holding, *Hunt* itself indicated that the Establishment Clause might not prohibit conduit bond financings for religiously affiliated institutions even if they were "pervasively sectarian" and might not prohibit funding of sectarian facilities. In footnote 7 to the opinion ("Footnote 7"), the Court observed, in dictum:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of

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the institutions in *Tilton v. Richardson*, 403 U.S. 672 (1971), in which the Court upheld federal construction grants to religiously affiliated colleges and universities to finance library buildings, a language laboratory, a fine arts building and a science building. In *Hunt*, even though members of the board of trustees were elected by the South Carolina Baptist Convention, approval of the Convention was required for certain financial transactions, and the charter could only be amended by the Convention, the Court concluded that "there [was] no basis to conclude that the College's operations [were] oriented significantly towards sectarian rather than secular education." *Hunt*, 413 U.S. at 743–44.

39. *Hunt*, 413 U.S. at 744.

40. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976).

> New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz*, where this Court upheld a local property tax exemption which included religious institutions.[41]

In Footnote 7, the Supreme Court identified the argument that the issuance of tax-exempt conduit revenue bonds for a religiously affiliated institution would not offend the Establishment Clause, because the nature of the aid the government provides is not an expenditure of public funds. The Court did not preclude reliance on the rationale discussed in Footnote 7, but based its decision instead upon its findings that the statute prohibited the college from using bond proceeds to pay for religious facilities and that the sectarian college seeking assistance was not pervasively sectarian.

The Court's reasoning in *Hunt* influenced judicial and bond counsel analysis of the constitutionality of tax-exempt financing for religiously affiliated hospitals and schools for the next three decades. Bond market participants ignored the Footnote 7 concept that conferring tax-exemption was not the equivalent of direct government support. Rather, in reliance on *Hunt,* state statutes, financing documents, and opinions rested validation of tax-exempt bonds for religiously affiliated entities on the ground that the institutions were not pervasively sectarian. Loan agreements prohibited use of bond proceeds to support schools of divinity or

41. *Hunt*, 413 U.S. at 745 n.7 (citations omitted).

places of worship, using language conforming to the Court's rules in *Hunt*. For example, in *Steele*, the loan agreement provided:

> The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.[42]

The *Steele* court focused upon this promise in order to uphold the issuance of tax-exempt bonds for the benefit of a sectarian university.[43] The Sixth Circuit's approach, however, radically differed from the Court's analysis in *Hunt*, because it relied on the arguments discussed in Footnote 7 to make its determination.[44] *Steele* upheld the issuance of the bonds, because the aid was an indirect benefit, analogous to a property tax exemption or a charitable deduction; no government funds were expended, and no recourse against the issuer of the bonds or the government that created the issuer existed in the event of non-payment. The conduit financing advanced a clear governmental, secular interest in promoting economic opportunity. The court also held that the bond program did not present the perception of

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42. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 404 n.1, *cert. denied*, 537 U.S. 1188 (2003).

43. The Industrial Development Board of Metropolitan Government of Nashville and Davidson County issued tax-exempt bonds pursuant to a state statute authorizing the issuance of bonds in furtherance of the educational purposes of nonprofit educational institutions, TENN. CODE ANN. § 7-53-101(11)(a)(vii) (1990 Supp.), and the Internal Revenue Code's § 141 permitting the issuance of tax-exempt bonds where all property to be provided by the net proceeds of the bond issue is to be owned by a 501(c)(3) organization. 26 U.S.C. § 141(e)(1)(G) (1994).

44. Other opinions that have discussed Footnote 7 include *Mitchell v. Helms*, 530 U.S. 793, 809–14 (2000) (Souter, J., dissenting), *Johnson v. Economic Development Corporation*, 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 519 (Nelson, J., concurring); *Virginia College Building Authority v. Lynn*, 538 S.E.2d 682, 695–96 (Va. 2000); and *Industrial Development Authority v. Mohler*, 51 Va. Cir. 449, 459 (Va. Cir. Ct. 2000).

government endorsement of religion.[45]

In reaching its determination, the court rejected the taxpayers' objection that, under *Hunt,* the issuance of the bonds had the unconstitutional effect of advancing religion by providing a benefit to a pervasively sectarian institution, a substantial portion of whose functions were subsumed in its religious mission. The court explained that "[t]he vitality of the pervasively sectarian test is questionable in light of subsequent, more recent decisions from the [United States] Supreme Court,"[46] but noted that it was "for the Supreme Court, not [the Sixth Circuit], to jettison the pervasively sectarian test."[47] It concluded that "[r]egardless of whether the pervasively sectarian test is still the law, . . . given the nature of the aid in question, the issue of the bonds [did] not offend the Establishment Clause."[48]

The *Steele* court explained that the government acted only as a conduit in a tax-exempt bond issue; that the borrower received the benefit of a lower interest rate than the interest rate on a taxable loan; that private lenders, not the government provided funds to the borrower; and that the only impact on public funds was the potential loss of tax revenue resulting from the lender's relief from the obligation of paying taxes on the interest received.[49] The court concluded that the issuance of tax-exempt bonds on a neutral basis was the provision of a generally available governmental benefit, akin to the provision of police and fire protection.[50]

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45. *Steele*, 301 F.3d at 416–17.

46. *Id.* at 408.

47. *Id* at 409. The court explained that the criticism of the pervasively sectarian test in the plurality opinion in *Mitchell* did not control the Sixth Circuit's decision since, as explained by the district court, "[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 408 (quoting Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 706 (M.D. Tenn. 2000)). Thus, only the holding of *Mitchell* was binding precedent. *Id.* Further, the Sixth Circuit stated, "[T]he lower courts are to treat [the Supreme Court's] prior cases as controlling until the Supreme Court itself specifically overrules them." *Id.* at 408–09 (citations omitted).

48. *Id.* at 409.

49. *Id.* at 413.

50. *Id* at 413–15.

Steele does not compel the conclusion that tax-exempt bonds may be issued to finance improvements for a religious institution since the Sixth Circuit stated that the university did not use bond proceeds to finance religious facilities.[51] Bond counsel could construct a viable argument, however, based upon extension of the Sixth Circuit's reasoning in *Steele,* that might persuade the United States Supreme Court to allow such financings for religious institutions.[52] To aid the examination, each portion of the *Lemon-Agostini* test, with reference to the *Steele* court's Footnote 7 analysis, is discussed below.

III. APPLICATION OF THE *LEMON-AGOSTINI-STEELE* GUIDELINES

A. The Statute Must Have a Secular Purpose

A statute authorizing the issuance of tax-exempt bonds that would allow financing of religious facilities for a sectarian institution must have a secular purpose.[53] In *Witters v. Washington Department of Services for the Blind*,[54] for example, the Court upheld tuition grants to a blind student who used federal funds to attend a religious college for the purpose of becoming a pastor, missionary, or youth director.[55] The Court identified the secular purpose of the statute—assisting visually handicapped students—and explained that no party had suggested that the "actual purpose" of the statute was to endorse religion or that the articulated secular purpose was a "sham."[56] Thus, religious institutions seeking tax-exempt financing must find statutory authorization in a law with a secular public purpose.

Finding a suitable statute is no easy task. A law enacted solely for the purpose of financing improvements for religious

51. *Id.* at 404, 416.

52. As discussed in note 15, the NABL opinion standard could not be met without a judicial decision approving the issuance of bonds.

53. Agostini v. Felton, 521 U.S. 203, 218–19 (1997).

54. 474 U.S. 481 (1986).

55. *Id.* at 489.

56. *Id.* at 485–86 (citations omitted).

institutions would violate the first prong of the *Lemon-Agostini* test, since its sole purpose would be to advance religion. *Texas Monthly, Inc. v. Bullock*,[57] for example, invalidated a state law that provided a tax exemption to periodicals that a religious faith published or distributed since the sole purpose of the exemption was to advance religion.

Thus, the secular purpose test would require a religious institution to identify an existing statute with a secular purpose that issuing bonds for the benefit of the religious institution would fulfill.[58] A statute that authorized tax-exempt financing for all 501(c)(3) corporations would be ideal. Typically, however, conduit statutes have a narrower focus than support for all nonprofit institutions. Existing conduit statutes generally have public purposes such as promoting economic development, education, or health care. Compounding the difficulty are provisions in existing conduit laws that prohibit the use of funds for religious facilities. For example, the definition of an "Education Facility" in Michigan's Higher Education Facilities Authority Act excludes "any facility used or to be used for sectarian instruction or as a place of religious worship, [or] a facility which is used or to be used primarily in connection with a part of the program of a school or department of divinity for a religious denomination."[59]

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57. 489 U.S. 1 (1989).

58. A court might uphold a law broadening the purposes of an existing statute if the legislative history did not demonstrate that the only purpose of the new law was to finance religious facilities.

59. MICH. COMP. LAWS ANN. § 390.922 (West 2004). Even in the absence of a specific prohibition on financing facilities for religious worship, determining that a religious institution's project was within the scope of an existing statute would be challenging. An argument that the legislature intended at the time it enacted the financing statute to include financing of religious facilities for sectarian institutions would be untenable since no state legislature could reasonably have believed that such financings were permissible at the time the statutes were enacted. If Supreme Court jurisprudence subsequently allowed the issuance of tax-exempt bonds for religious institutions, however, a local government issuer and a court could reasonably determine that financing religious facilities would fulfill the public purpose of a bond financing statute even if such a financing would have been impermissible when the statute was originally enacted. For example, after the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), state Medicaid

To ascertain the scope of the bond financing statute, a court would examine the words of the statute.[60] Bond financing statutes typically identify the types of improvements that an issuer may support. For example, Texas statutes define "Educational Facility" as follows: " 'Educational Facility' means a classroom building, laboratory, science building, faculty or administrative office building, or other facility used exclusively for the conduct of the educational and administrative functions of an institution of higher education."[61]

Maryland defines a hospital "project" in this manner:

> "[P]roject", in the case of a participating hospital, means a structure suitable for use as a hospital, clinic, or other health care facility, laboratory, training facilities for nursing and other health programs, laundry, nurses' or interns' residence, and such other structure or facilities necessary or useful for the effective operation of a hospital.[62]

These Texas and Maryland statutes and similar state laws are easily adapted to financing nonreligious educational facilities at sectarian universities and nonreligious health facilities at sectarian hospitals.[63] In *Hunt,* for example, the Court held that a state statute authorizing tax-exempt financing for the benefit of institutions of higher education had the secular purpose of advancing education, not the purpose of promoting religion, because its benefits were available to all institutions of higher education whether or not they

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programs would have been permitted to fund abortions, even though such funding would have been prohibited prior to the decision in *Roe. See* Harris v. McRae, 448 U.S. 297, 311 n.16 (1980). Thus, a court could conclude that financing facilities for the religious institution would fulfill the public purpose of the statute because the state legislature intended to authorize any constitutionally permissible method of fulfilling that goal.

60. *See* 73 AM. JUR.2D *Statutes* § 24 (1997).

61. TEX. EDUC. CODE ANN. § 53.02(6) (Vernon 2003).

62. MD. ANN. CODE art. 43C, § 3 (2002).

63. Maryland and Texas bond counsel would need to review the statutory analysis and, in particular, to confirm that no constitutional or statutory prohibition against sectarian use of facilities financed exists.

had a religious affiliation.[64]

Using *Hunt*'s rationale, in *State ex rel. Wisconsin Health Facilities Authority v. Lindner*,[65] the Wisconsin Supreme Court upheld the issuance of tax-exempt bonds for the benefit of a Catholic hospital and identified improving health care delivery by lowering health care costs as the "wholesome secular purpose" of the bond financing statute.[66] Similarly, in *Johnson v. Economic Development Corp.*,[67] the Sixth Circuit upheld the issuance of tax-exempt revenue bonds by a public economic development corporation to finance improvements at a sectarian elementary and secondary school.[68] State law authorized the corporation to finance construction of projects for sectarian and non-sectarian entities for the secular purpose of alleviating and preventing conditions of unemployment.[69] Like the courts in *Hunt* and *Lindner*, the *Johnson* court easily concluded that the bond financing statute had a secular purpose.

In contrast, it would be challenging to convince a court that tax-exempt bonds issued to finance a chapel or other religious project served educational or health care purposes. A broad statute that authorized tax-exempt financing of any facilities authorized or permitted by the corporate documents of a university or hospital would allow a chapel to be financed if the organizational documents of the institution permitted borrowing for such purpose. Typical state statutes, however, would require the religious institution to fit its project within narrow statutory definitions. Under the Texas statute described above, for example, a university that was not pervasively sectarian would argue that the campus chapel was an "educational facility,"[70] because it was integral part of the purpose of the institution—the education of students. So long as the students were not required to adopt the dogmas of the host church, opening chapel services to all university students would teach

64. Hunt v. McNair, 413 U.S. 734, 741 (1973).
65. 280 N.W.2d 773 (Wis. 1979).
66. *Id.* at 777–78.
67. 2001 FED App. 0015P (6th Cir.), 241 F.3d 501.
68. *Id.* at 516 (determining that the school was not pervasively sectarian).
69. *Id.* at 503.
70. TEX. EDUC. CODE ANN. § 53.02(6) (Vernon 2003).

students about the practices of the church. The state legislature could also reasonably have intended that financing a chapel would advance education in the university community where the chapel would be used for interfaith services or for meetings and convocations unrelated to religion.

Similarly, to justify on nonreligious grounds the expenditure of tax-exempt bond proceeds to construct a chapel at a hospital, a Maryland hospital would demonstrate that the chapel fit within the statutory definition of a "project." Because of the health benefits of prayer, the chapel would constitute a facility "necessary or useful for the effective operation of a hospital."[71] Evidence that the patient and family use of the chapel promotes health care would tend to indicate that the chapel advanced a religious mission only incidentally.[72] Fitting the funding of a chapel squarely within the secular statutory definition would therefore demonstrate that the bond statute itself was religiously neutral and had a valid secular purpose.

Because financing statutes were written while the prevailing view was that no financing could occur for a pervasively sectarian institution, identifying a statute that authorizes financing of facilities for a religious institution not affiliated with an educational or health care institution is difficult. Making the financing of religious facilities for a church, synagogue, temple, or mosque fit within the declarations of public purpose of bond financing statutes is less obvious than reaching the conclusion that financing a school or hospital project, even for a religious institution, advances educational or health care goals. One possibility is to focus on the economic development benefits that a religious institution's project would confer upon a community.

Cases concerning property tax exemptions for religious institutions have identified the economic importance of religious institutions. In *Murray v. Comptroller of the Treasury*,[73] for example, the Court of Appeals of Maryland examined the public purpose of exempting church property from property taxation. The

71. MD. ANN. CODE art. 43C, § 3 (2002).
72. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).
73. 216 A.2d 897 (Md. 1966), *cert. denied*, 385 U.S. 816 (1966).

court acknowledged the economic benefit to a community of a house of worship, stating that houses of worship attracted persons to communities and increased the tax assessment base.[74] Using *Murray* as a template, a religious institution would argue that local businesses would benefit from the influx of parishioners who might patronize their stores. The religious institution would demonstrate that surrounding property values would increase as a result of the availability of the religious institution. Statistics supporting these assertions would counter arguments that financing the construction of a religious institution decreases public revenues by increasing the amount of property exempt from property taxes.[75]

Johnson offers an additional basis for arguing that religious institutions support the economy. As evidence of the promotion of economic development in *Johnson,* the court noted that the issuer had determined that, after the project was completed, the school would employ five new teachers and two new maintenance workers.[76] Similarly, a religious institution could demonstrate that it would employ a sexton, teachers, program directors, service workers, and members of the clergy.[77]

In addition to meeting the requirements of an economic development statute, a religious institution could argue that issuing

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74. *Id.* at 908–09 (citation omitted).

75. *Murray* acknowledged contrary authority in connection with church zoning cases which dealt with the apparently negative effect of permits for the building of houses of worship on immediately adjacent property, but said that those cases did not apply because "[t]he effect of the building of a church upon the values of adjacent property may be quite different from the stimulation to house buying and building in the community as a whole." *Id.* at 909 n.6.

76. *Johnson v. Econ. Dev. Corp.*, 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 505.

77. Some states' economic development statutes appear to preclude such projects. The Kentucky Economic Development Finance Authority, for example, may limit projects to industrial and manufacturing enterprises. KY. REV. STAT. ANN. § 154.20 (Michie 2003). In Tennessee, the economic development statute appears to allow financings for office buildings but not for other kinds of buildings for nonprofit institutions. TENN. CODE ANN. § 7-53-101(11) (1998) (defining "Project"). Other state economic development statutes must be canvassed and interpreted to determine whether the language of the statute would encompass religious facilities.

bonds for its benefit fit the secular state law purpose enunciated in a statute authorizing the issuance of bonds to promote the general welfare of the community. In *Good News Club v. Milford Central School*,[78] the Court upheld the use of school classrooms after the end of the school day by a religious group "not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[79] The majority opinion equated the services provided by the club to those provided by the Boy Scouts[80] and found that the program fit within a statute that allowed use of school rooms by the public for "instruction in any branch of education, learning or the arts" or for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."[81] Thus, a financing statute that allowed issuance of tax-exempt bonds for the secular purpose of promoting instruction in any branch of education, learning or the arts or for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community would allow financing of a sanctuary for a religious institution that fostered those goals.

Although its ability to fit within current statutes would be challenging, the religious institution could also argue that it enhanced health care and social services in the community by encouraging citizens to support health care programs and by providing support to the social service programs of religious institutions. For example, some religious institutions provide AIDS outreach services. Some provide emergency food assistance. Others provide medical services.[82] In *Murray*, the court relied on

78. 533 U.S. 98 (2001).

79. *Id.* at 138 (Souter, J., dissenting).

80. *Id.* at 108.

81. *Id.* at 102 (citations omitted).

82. See, for example, the descriptions of health care and social services provided by religious institutions at Temple Emanu-El, *Social Action*, *at* http://www.tedallas.org/social_action.asp (last visited Mar. 27, 2004) (on file with the First Amendment Law Review); Diocese of Dallas, *Services and Facilities*, *at* http://www.cathdal.org/Services.htm (last visited Mar. 27, 2004) (on file with the First Amendment Law Review); and Islamic Ass'n of N. Tex.,

the social activities of religious organizations "such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities" that "serve public needs [and save] the State the expense of providing the same services."[83] Thus, financing improvements for a religious institution might fit within the plain meaning of statutes authorizing financing for health care and social services.

This section has discussed ways in which the issuance of bonds to finance religious facilities could satisfy state statutory secular public purpose requirements. Identifying a tax-exempt bond financing statute with a broad secular purpose that financing improvements for a religious institution would accomplish, and which applied neutrally to sectarian and non-sectarian institutions, would satisfy the first prong of the *Lemon-Agostini-Steele* test, even though the statute as applied would benefit a religious institution.

B. The Statute May Not Have a Primary Effect of Advancing or Inhibiting Religion

Once a court established the secular purpose of the bond financing statute, it would then address whether the statute had a primary effect of advancing or inhibiting religion. Supreme Court cases focus upon whether a statute results in government indoctrination, creates an excessive entanglement between the government and a religious institution or defines recipients of benefits by reference to religion. This section will analyze these aspects of Establishment Clause principles.[84]

Medical Clinic, *at* http://www.iant.com/clinic.psp (last visited Mar. 27, 2004) (on file with the First Amendment Law Review).

83. Murray v. Comptroller of the Treasury, 216 A.2d 897, 907 (Md. 1966), *cert. denied*, 385 U.S. 816 (1966).

84. For examinations of these aspects of the *Lemon-Agostini* test with respect to financing of secular facilities for pervasively sectarian schools, see Trent Collier, *Revenue Bonds and Religious Education: The Constitutionality of Conduit Financing Involving Pervasively Sectarian Institutions*, 100 MICH. L. REV. 1108 (2002); Stuart J. Lark, *'Pervasively Sectarian' Institutions May Now Qualify for Tax-Exempt Financing*, 12 J. TAX'N EXEMPT ORG. 173, (2001); Richard D. Winders, *Building on the Establishment Clause: Government Conduit Financing of Construction Projects at Religiously Affiliated Schools in*

(1). The Statute May Not Have a Primary Effect of Advancing or Inhibiting Religion by Resulting in Governmental Indoctrination

Whether governmental aid to religious institutions results in governmental indoctrination is ultimately a question of whether the indoctrination that occurs at religious institutions is attributable to the government.[85] In its determination of the issue of government indoctrination in *Mitchell v. Helms*, a plurality of the Supreme Court identified the primary factor as whether the government provides aid neutrally, without regard to religion.[86] In defining "neutrality," the plurality focused on whether the government distributed government aid directly to religious institutions or whether individuals making private choices resulted in the delivery of government aid to religious institutions.[87] A discussion of these aspects of governmental indoctrination follows, including consideration of whether a court could characterize conduit financings as involving true private choice and examination of the

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Johnson v. Economic Development Corp., 35 CREIGHTON L. REV. 1151 (2002). For practitioners' commentaries on this issue, consult Jeffrey O. Lewis & John E. Farina, *Tax-Exempt Bond Financing for Faith-Based Institutions: The New Constitutional Climate*, *at* http://www.icemiller.com/publications/29/faith_based.html#N_3_ (last visited Apr. 5, 2004) (on file with the First Amendment Law Review); Jeffrey O. Lewis, *April 2002 Update to "Tax-Exempt Financing for Faith-Based Organizations: The New Constitutional Climate"*, *at* http://www.icemiller.com/lawyer_detail/id/871/ index.aspx (last visited Apr. 5, 2004) (on file with the First Amendment Law Review); Jeffrey O. Lewis, *July 2002 Update to "Tax-Exempt Financing for Faith-Based Organizations: The New Constitutional Climate"*, *at* http://www.icemiller.com/lawyer_detail/id/871/index.aspx (last visited Apr. 5, 2004) (on file with the First Amendment Law Review); Jeffrey O. Lewis, *August 2002 Update to "Tax-Exempt Financing for Faith-Based Organizations: The New Constitutional Climate"*, *at* http://www.icemiller.com/lawyer_detail/id/871/index.aspx (last visited Apr. 5, 2004) (on file with the First Amendment Law Review); and Jeffrey O. Lewis, *Executive Summary: The Doctrine of Pervasive Sectarianism & the Bond Lawyer's Dilemma*, *at* http://www.icemiller.com/lawyer_detail/id/871/index.aspx, (last visited Apr. 4, 2004).

85. Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion); *see* Agostini v. Felton, 521 U.S. 203, 226 (1997).

86. *Mitchell*, 530 U.S. at 809–10.

87. *Id.* at 809–10, 816.

implications of government authorization and approval of the bonds.

(a). Neutrally Available Aid under Mitchell v. Helms

In *Mitchell*, the Supreme Court considered a challenge to a federal school funding program that provided for the loan of secular, neutral, and nonideological instructional and educational materials to public and private nonprofit schools, including sectarian schools. Justice Thomas, with Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joining, applied *Agostini*'s modification of the *Lemon* test and upheld the aid program. In assessing the government indoctrination question, the plurality relied on the neutrality of the aid statute, concluding that "any aid going to a religious recipient only [had] the effect of furthering [a] secular purpose"[88] and did not constitute government indoctrination where "the religious, irreligious and areligious [were] all alike eligible for governmental aid."[89]

Using the principle of neutrality, a religious institution would maintain that religious institutions are one type of organization among many that a bond financing statute benefits in order to further that statute's secular public purpose. In *Steele,* for example, the wide range of the bond statute's beneficiaries, including sectarian and non-sectarian educational institutions, manufacturers and stores, succeeded in convincing the court to validate bonds for a religiously affiliated university.[90]

The *Johnson* court also focused on the concept that the statute benefited a diverse group of citizens, citing *Witters* as an

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88. *Id.* at 810.

89. *Id.* at 809 (citation omitted). Justice O'Connor, with Justice Breyer joining, concurred in a separate opinion in *Mitchell,* expressing her unwillingness to rely solely upon the neutrality of an aid statute or to tolerate actual diversion of government aid to religious indoctrination. *Id.* at 837–38 (O'Connor, J., concurring in the judgment). Diversion of government aid to religious indoctrination was also a primary concern of Justices Souter, Stevens, and Ginsburg who dissented in *Mitchell. Id.* at 890–95 (Souter, J., dissenting).

90. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 416, *cert. denied*, 537 U.S. 1188 (2003).

example of permissible aid to a religious institution where the nature of the statute negated the primary effect of advancing religion.[91] Thus, under the reasoning of the *Johnson* court and of the plurality in *Mitchell*, a bond financing statute that established neutral criteria for awarding aid for secular purposes should not have a primary effect of advancing religion, since the religious principles of the benefited religious institutions would not be attributable to the government.

(b). Private Choice as an Aspect of Neutrally Available Aid

The plurality in *Mitchell*, relying on *Agostini*[92] and *Zobrest v. Catalina Foothills School District*,[93] also found significant the fact that the religious institutions received aid "only as a result of the genuinely independent and private choices of individuals."[94] Independent choices made by individual parents who received state aid and chose to use the state assistance to send their children to religious schools severed the link between government advancement of religion and government aid. The Court reasoned that private choices, rather than the single choice of government, prevented the government from granting special favors that might lead to an establishment of a religion.[95] Thus, in *Zobrest*, the Court upheld the expenditure of government funds for a sign language interpreter for a student at a sectarian high school. The funding statute provided government assistance to disabled students without regard to the "sectarian-nonsectarian, or public-nonpublic nature of the school."[96] In *Witters*, as noted above, the government paid tuition for a blind student who chose to apply the government funds to attend a religious college for the purpose of becoming a religious leader. In those cases, *Mitchell* explained, the statutes

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91. Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 513.

92. Agostini v. Felton, 521 U.S. 203, 223 (1997).

93. 509 U.S. 1, 10 (1993).

94. *Mitchell*, 530 U.S. at 810 (quoting *Agostini*, 521 U.S. at 226 (quotations omitted)).

95. *Mitchell*, 530 U.S. at 810.

96. *Id.* at 811 (quoting *Zobrest*, 509 U.S. at 10).

created no financial incentive to the individual beneficiaries to choose sectarian schools, and thus government funding was not attributable to a decision made by the state.[97]

The *Mitchell* plurality also compared the federal funding statute to a state statute, upheld in *Mueller v. Allen,*[98] that allowed a state income tax deduction for educational expenses, whether related to public schools or private schools, sectarian or non-sectarian. The statute the Court considered in *Mueller* "neutrally provide[d] state assistance to a broad spectrum of citizens."[99] and thus "no 'imprimatur of state approval' [could] be deemed to have been conferred on any particular religion or on religion generally."[100] Thus, to the *Mitchell* plurality, private choice and neutrality were the main determinants of the constitutionality of a government aid statute.[101]

Using the logic of *Mitchell*, a religious institution could assert that bonds issued for its benefit were valid, because bond purchasers would direct bond proceeds to the religious institution as a part of a neutral program that provided benefits under a bond statute to a broad spectrum of organizations. The *Steele* court accepted this reasoning, holding that, because individual bondholders, not the government, furnished loan proceeds in a tax-exempt bond financing, the extension of aid in the form of tax exemption did not result in governmental indoctrination. *Virginia*

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97. *Id.* at 811–12.

98. 463 U.S. 388 (1983).

99. *Id.* at 398–99, *see also Mitchell*, 530 U.S. at 813 (quoting this description from *Mueller*).

100. *Mitchell*, 530 U.S. at 813 (quoting *Mueller*, 463 U.S. at 397).

101. *Id.* at 830. The *Mitchell* plurality also rejected the idea that aid must pass literally through private hands in order to avoid an Establishment Clause violation, saying that "there is no reason why the Establishment Clause requires such a form." *Id.* at 813, 816. The plurality posited that the result in *Witters* would not have changed if the government had sent its check directly to the sectarian university instead of to the student. *Id.* at 813, 820 n.8 (plurality opinion). Justices Souter, Stevens, and Ginsburg objected to the plurality's formulation, believing that under the Court's precedents aid should not go directly to religious schools on a school-wide basis and that aid with actual religious content should be barred. *Id.* at 888–90 (Souter, J., dissenting).

College Building Authority v. Lynn[102] also adopted this principle.

Steele and *Lynn* held that the actions of individual bondholders who chose to buy bonds broke the link between the government's issuance of bonds and the advancement of religion. These cases rested on Establishment Clause cases relying on the private choices of individuals to obviate the appearance of governmental support for a sectarian institution. For example, using the same rationale as *Mitchell*, the Supreme Court in *Zelman v. Simmons-Harris*[103] upheld Ohio's school voucher program against an Establishment Clause challenge, even though most vouchers were used at pervasively sectarian primary and secondary schools.[104] Relying upon *Mueller*, *Witter*, and *Zobrest*, the Court decided that the voucher program did not have the forbidden effect of advancing or inhibiting religion, because individual choices made by a broad class of citizens directed government aid to religious schools. The Court explained, "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits."[105] Thus, in *Mueller*, *Witters*, *Zobrest*, *Mitchell*, and *Zelman*, Supreme Court Justices have relied upon the argument that individual choice could break the connection between the government and a religious institution and thus avoid an Establishment Clause violation.[106] The

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102. 538 S.E.2d 682, 698–99 (Va. 2000).

103. 536 U.S. 639 (2002). Justices O'Connor, Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's opinion, and Justices O'Connor and Thomas each concurred separately.

104. *Id.* at 663 (O'Connor, J., concurring).

105. *Id.* at 652.

106. In contrast to the Court's reliance on the "private choice" theory in the cases cited above, the Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), suggests that state sponsorship of a religious institution, evidenced by the government's adoption of a bond resolution and entering into a loan agreement with a religious institution, may be of critical significance to the Court's analysis. In *Santa Fe*, Justice Stevens's majority opinion, joined by Justices O'Connor, Kennedy, Breyer, Ginsburg and Souter, held that a school district abridged religious liberty where the district's policy encouraged a student speaker selected by majority vote of his fellow students to deliver religious messages at football games. *Id.* at 306, 316–

Supreme Court has not yet adopted the reasoning in *Steele* and *Lynn* that the choices of bondholders are comparable to the choices of parents in the voucher and other state aid cases.

The "private choice" argument is strained, since private investors also furnish moneys to purchase bonds issued by a government to finance traditional improvements such as streets and sewers. A government cannot issue bonds except for a proper public purpose.[107] As a result of this rule, the actions of private investors in a traditional financing *must not* sever the link between the government's borrowing and the advancement of its public purpose of providing streets and sewers. Similarly, the actions of bondholders must not step between the government's issuance of conduit bonds and the advancement of its secular purpose. In either case, if bondholder choice broke the connection between the government's advancement of a public purpose and the issuance of the bonds, then the government would not have authority to issue the bonds.

In spite of the apparent weakness of the private choice argument, *Mitchell* suggests that Justices Rehnquist, Scalia, Kennedy, and Thomas and would be sympathetic to the private choice and neutrality arguments. *Zelman* adds Justice O'Connor and Justice Breyer as possible supporters based upon private choice, although their concurrence emphasized that, in the "true private choice programs" in *Witters* and *Zobrest*, "[t]he fact that aid flow[ed] to the religious school and [was] used for the advancement of religion [was] . . . *wholly* dependent on the student's private decision."[108] As discussed below, the government's role is crucial in

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17. The fact that an individual student, not a school district official, delivered the prayers did not act as a "circuit-breaker" between state sponsorship and private action. *Id* at 305–06, 310. While *Santa Fe* may be explained in part by the Court's special concern for impressionable primary and secondary school students and in part because only a single student, representing only one viewpoint, was selected as speaker for the entire football season, it confirms that the individual Justices' characterizations of the role of the government in a conduit financing would be critical to their determination of the Establishment Clause issues. *See infra* Sections II(B)(1)(c) and (d).

107. 64 AM. JUR. 2D *Public Securities and Obligations* § 92 (2001).

108. Mitchell v. Helms, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring in the judgment).

a conduit financing, and the fact that aid would flow to a religious institution and be used for the advancement of religion would not be *wholly* dependent on bondholders' private decisions.

(c). The Role of Government Choice in Conduit Financings

To analyze the "individual bondholder choice" argument and thus determine whether the indoctrination that occurs at religious institutions is attributable to the government in a conduit financing, a court should examine two important government decisions that a successful tax-exempt bond transaction requires. Under federal law, a governmental body and an elected official[109] select the religious institutions for whose benefit the governmental body will issue bonds. The resolution that the governmental entity adopts to authorize issuance of the bonds and the applicable elected official's TEFRA approval[110] must satisfy the constitutional prohibition against laws respecting an establishment of religion.[111]

Congress enacted the public notice and elected official approval requirements to eliminate inappropriate uses of tax-exempt financing and to help restore the benefit of tax-exempt financing for traditional government purposes. To determine whether a bond issue serves a legitimate purpose, federal tax law requires that elected representatives of the governmental unit determine, following a public hearing, that the bonds provide a substantial public benefit.[112] The government choice that federal law mandates distinguishes tax-exempt bond financing from the programs the Court approved in *Witters*, *Zobrest*, and *Mitchell.* A court might reasonably attribute the indoctrination that occurs at

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109. As an alternative, voters in the jurisdiction where the project is located may approve the bonds. *See supra* note 16.

110. *See supra* note 16.

111. Under the Fourteenth Amendment, local governments as well as the state itself can make no law respecting an establishment of religion. *See* Everson v. Bd. of Educ., 330 U.S. 1, 3–4 (1947) (referring to the resolution the school board adopted authorizing reimbursement to parents of moneys expended by them for bus transportation).

112. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 414 n.9, *cert. denied*, 537 U.S. 1188 (2003).

religious institutions seeking support through tax-exempt bonds to the government instrumentality and the applicable elected official and not to the individual bondholders. Under this view, the resolution authorizing the issuance of the bonds would constitute a law respecting an establishment of religion. The resolution adopted by the government instrumentality with respect to an individual project for a pervasively sectarian institution would constitute an additional legislative action, not present in *Agostini* and *Mitchell*, which might have the primary effect of advancing or inhibiting religion, even though the state bond financing statute was a neutral law with a secular purpose that did not have such an effect.

In some states, judicial interpretation has lent force to the argument that issuance of bonds by a governmental entity constitutes prohibited government support for the benefited institution. For example, like other state constitutions, the Ohio constitution prohibits lending of credit in aid of private corporations by the state and by municipalities and other local governments.[113] In 1964, the Ohio Supreme Court determined that issuance of conduit bonds by a local government was a lending of credit by the government to the benefited for-profit private entity.[114] Responding to this reading of the state constitution, Ohio voters amended the Ohio constitution[115] to authorize cities and counties to lend their credit in aid of private entities by issuing bonds to support private enterprises engaging in industry, commerce, distribution and research.[116] In *State ex rel. Taft v. Campanella*,[117] the court expressed a similar view with respect to nonprofit corporations, stating that "a non-profit corporation whose primary function [was] for a public purpose [was] not prohibited from

113. OHIO CONST. art. VIII, §§ 4, 6.

114. State *ex rel.* Saxbe v. Brand, 197 N.E.2d 328, 333 (Ohio 1964). In *Brand*, the Ohio Supreme Court invalidated conduit bonds benefiting a private for-profit corporation as an unconstitutional lending of the state's credit. *Id.*

115. OHIO CONST. art. VIII, § 13.

116. County of Stark v. Ferguson, 440 N.E.2d 816, 819–20 (Ohio App. 1981).

117. 368 N.E.2d 76, 85 (Ohio App. 1977), *aff'd*, 364 N.E.2d 21 (Ohio 1977).

obtaining the benefit of government credit in the form of revenue bonds."[118] The Ohio court's interpretation that conduit bonds by their nature constituted a lending of the state's credit to a private beneficiary bolsters the argument that issuance of tax-exempt bonds is more than a government service. Issuance of bonds is a positive action by the government that could be said to have a primary effect of advancing or inhibiting religion because the tenets of the benefited religious institution would be attributable to the government.

Even in states in which a city, county, or other local government creates a separate non-governmental entity for the purpose of issuing bonds,[119] governmental approval is critical to the validity of tax-exempt bonds and the appearance of governmental indoctrination must be addressed. Under federal law, a governmental instrumentality, whether a state or local government or the creation of a state or local government, must be the issuer of the bonds. The government instrumentality lends proceeds of the government's bonds to the religious institution. The religious institution repays the loan pursuant to a loan agreement between the government instrumentality and the religious institution. The government instrumentality's bonds contain an agreement to repay the bondholders, albeit from revenues derived from the conduit borrower under the loan agreement. An elected official or the voters of the jurisdiction in which the project is located are required to give TEFRA approval of the bonds.[120] Even though the

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118. *Id.*

119. In these states, courts have held that issuance of conduit bonds by the government instrumentality does not constitute an impermissible lending of the government's credit. *See, e.g.*, In re Advisory Opinion re: Constitutionality of P.A. 1975 No. 301, 254 N.W.2d 528, 534–35 (Mich. 1977) (concluding that, since the bonds would be issued by an entity distinct from the state and would be payable from project revenues, the bonds were not debt prohibited by the state constitution).

120. 26 U.S.C. § 147(f) (1994). Voter approval might avoid the Establishment Clause issue with respect to the TEFRA approval requirement, but not with respect to the actions of the government instrumentality in authorizing and issuing the bonds as discussed *infra* Section III(B)(1)(d). TEFRA approval by electors might also be considered government action under *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), since

government instrumentality is never responsible for making payments on the bonds and the religious institution agrees to indemnify the government for all costs it might incur as part of the transaction, it is troubling that federal law requires that a governmental entity issue tax-exempt bonds and a governmental official approve the bonds, if the role of the government is insignificant.

(d). Significance of the Government's Selection of Benefited Institutions

This subsection will examine whether the government approval of a conduit financing for a religious institution conclusively determines that the indoctrination that occurs at religious institutions is attributable to the government. It will first consider the significance of government selection of religious institutions benefited by conduit financing and then focus on the consequences of the government's role, examining the importance of public perception of government support.

(i). The Selection Process

Examples from the executive and judicial branches suggest that the government can identify organizations as religious and confer or refuse to confer benefits upon those institutions. A religious institution could argue, for example, that the approval by the Internal Revenue Service of 501(c)(3) status for a religious institution is comparable to the adoption of a bond resolution approving the issuance of tax-exempt bonds to assist a religious institution whose project would further secular goals. In conferring tax-exempt status to a religious institution, the IRS makes no inquiry into doctrine; it only examines the use of the religious institution's money to ensure that the institution, not a private individual, receives the support.[121]

The executive branch of state government also provides

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the government would sponsor the election procedures. *See supra* note 106 and accompanying text.

121. 4 BORIS BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 100.3.3 (2d ed. 1989).

instances of government decisions affecting religious institutions. The Texas Attorney General, for example, interpreted a statutory definition of "religious worship" in order to determine whether certain property was exempt from state ad valorem property taxes.[122] Courts have also addressed the issue of defining "religious institution" and thus courts select religious institutions for favors and deny privileges to other organizations. For example, in *United States v. Meyers*,[123] the Tenth Circuit determined that the Church of Marijuana was a philosophy or way of life and not a religious institution with religious tenets that could excuse a criminal conviction for use of marijuana.[124] The Tenth Circuit did not appear to believe that if the court made the determination that a philosophy constituted a religion worthy of protection under the Free Exercise Clause, it would thereby "establish" a religion.

Using the example of the executive and judicial branches, a legislative body such as a city council could determine, without inquiring into doctrine, that funding a particular religious institution's project would support the governmental authority's secular goals. A governmental authority would select and lend bond proceeds to a religious institution not because of the religious character of the church, but because its project fulfilled a secular public purpose. Allowing a government issuer to select which projects would fulfill public purposes was one of the goals of

122. OP. TEX. ATT'Y GEN. MW-553 (1982).

123. 95 F.3d 1475 (10th Cir. 1996).

124. *Id.* at 1484; *see also* Universal Life Church, Inc. v. United States, 372 F. Supp. 770, 776 (E.D. Cal. 1974) (allowing First Amendment protection for a church with no defined creed but which offered degrees in divinity studies); *cf.* Hernandez v. Comm'r, 490 U.S. 680, 696 (1989) (holding that the disallowance by the IRS of a charitable deduction for auditing fees paid by church members did not violate the Establishment Clause). *Hernandez* held that "routine regulatory interaction which involve[d] no inquiries into religious doctrine, . . . no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . [did] not of itself violate the non-entanglement command." *Id.* at 696–97 (citations omitted); *see also* Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 412, *cert. denied*, 537 U.S. 1188 (2003) (quoting the above language from *Hernandez*).

TEFRA.[125]

In general, a local government has discretion to choose which institutions it will assist. Government instrumentalities make distinctions among citizens at every meeting, subject to equal protection, due process and other constitutional provisions. Clearly, a government instrumentality that only agreed to issue tax-exempt bonds for the religious institutions attended by members of its governing body would be unconstitutional. For example, in *Williams v. Lara*,[126] the court held that a prison rehabilitation program that created a separate unit within the prison for inmates volunteering to attend instruction in a Christian religious curriculum reflecting only the views of the sheriff and chaplain violated the Establishment Clause.[127] Absent constitutional objections, however, public bodies would not be required to provide support to every applicant for assistance.[128] In *Riverview Investments, Inc., v. Ottawa Community Improvement Corp.*,[129] for example, the court concluded that a quasi-governmental body was entitled to turn down an application for tax-exempt financing.[130] Similarly, in *Steele*, the court observed:

> Congress delegated to [local governmental authorities issuing tax-exempt bonds] an element of control over local economic development. The revenue bonds serve as a

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125. *Steele*, 301 F.3d at 414.

126. 52 S.W.3d 171 (Tex. 2001).

127. *Id.* at 176.

128. *See infra* note 251 for discussion of *Nat'l Endowment for the Arts v. Finley*.

129. 769 F.2d 324 (6th Cir. 1985).

130. *Id.* at 327. In *Riverview*, the bond financing statute required the approval of a Community Improvement Corporation (CIC) before a city could issue conduit bonds. *Id.* at 326. The reason for disapproval was that the CIC members did not want economic competition for their own businesses. *Id.* at 328. This approval process was not a due process violation; in the court's words, "[A]n entitlement does not arise just because the [CIC] has approved the bond applications of other applicants. The approval of other applications does not in itself create a legitimate expectation of entitlement on the part of the plaintiff. Since the [CIC] did not deprive plaintiff of a property right in the bonds, there has been no constitutional violation." *Id.* at 327.

> means of financing local preferences. For example, a local government might conclude that the issuance of an industrial revenue bond to a new business could give a competitive disadvantage to an existing business which had not received such conduit financing and result in economic displacement, rather than development.[131]

A local government might have a legitimate governmental interest in turning down a religious institution's application for tax-exempt financing, related to fulfilling the secular public purpose of the statute, but unrelated to the governmental body's opinions of the religious institution's tenets. For example, in a different context, in *St. Paul's Protestant Episcopal Church v. City of Oakwood*,[132] a city's zoning code prevented a church from constructing a parking lot on property it owned that was not immediately adjacent to the tract upon which the church building was located. The court determined that, even if St. Paul's were the only church in Oakwood that the zoning code prevented from building a parking lot, the City would not have committed an equal protection violation, since the City was not basing its building permit denial upon the religious views of the church members.[133] Government officials might have valid reasons unrelated to constitutional issues, such as zoning concerns, for giving a benefit to one institution but not to another.

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131. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 414, *cert. denied*, 537 U.S. 1188 (2003).

132. No. C-3-88-230, 1998 WL 1657172 (S.D. Ohio Mar. 3, 1998).

133. *St. Paul's Protestant Episcopal Church*, 1998 WL 1657172, at *7. The court also determined that the denial of a parking lot permit did not burden St. Paul's free exercise of religion, since the City regulated its ability to build a parking lot, not the beliefs of its members. *Id.* In *Al-Salam Mosque Foundation v. City of Palos Heights*, No. 00 C 4596, 2001 WL 204772 (N.D. Ill. Mar. 1, 2001), the court held that a mosque stated a claim for relief when it alleged that a city burdened the free exercise of religion by preventing a religious organization from buying land on which to build a place of worship, "a core religious practice," but denied summary judgment so that it could be established whether the denial was based on permissible procedural grounds that did not involve a constitutional violation. *Id.* at *2–*3.

The government's ability to select projects, however, might result, albeit unintentionally, in favoring some religious institutions over others. A governmental body could issue bonds to benefit a religious institution and then properly exercise its discretion and refuse to approve bonds for a second religious institution. Even though the governmental body would have expressed a "local preference," as Congress intended when it enacted TEFRA,[134] a court might find that issuance of bonds for the first, favored religious institution constituted the establishment of a religion. Even if a city council scrupulously avoided discrimination among religious institutions, it might inadvertently "establish" a particular religious institution as the only religious institution in the city that the government had approved, even though it had legitimate, non-discriminatory reasons for turning down a second religious institution's application.

Another concern is the possibility that the government would not act in good faith. Government officials would be likely to give no reasons for their refusal to approve bonds for the benefit of an obscure or unpopular religious sect rather than to acknowledge discriminatory views. Under the rule Justice Thomas enunciated in *Mitchell*, it could be argued that a conduit bond financing statute would provide for neutral government aid as between nonreligious and religious institutions, and among religious institutions. It is not clear, however, that, in practice, neutrality among religions would be maintained when the legislative body acted. A similar argument persuaded the Court in *Board of Education of Kiryas Joel Village School District v. Grumet*.[135] In *Kiryas Joel*, a state statute enacted solely to benefit one religious community did not withstand Establishment Clause scrutiny,[136] even though, as Justice Scalia argued in dissent, there was no reason to believe that the legislature would not accommodate another religious community that made a request for similar legislation.[137] One can imagine that a city council might

134. *Steele*, 301 F.3d at 414.
135. 512 U.S. 687 (1994).
136. *Id.* at 703.
137. *Id.* at 745–47 (Scalia, J., dissenting).

favor the religious institutions with the greatest number of members, representing those congregants who elected the council members. Even if the governmental instrumentality were willing to support all institutions, however, religious institutions with fewer members or less wealthy members might be excluded from the benefits of tax-exempt financing if they lacked resources to pay costs associated with a transaction. Thus, religious institutions for which financing was provided would appear to have government support, while others did not. A conduit bond program that, realistically, only large religious institutions could take advantage of would risk conveying the message of religious favoritism. This possibility, and the danger of actually supporting a particular type of religious practice, would exist regardless of whether the issuer intended that the program have that effect.

(ii) Public Perception and the Appearance of Government Imprimatur

Even if a local government established an effective way to accommodate all religious institutions applying for assistance and perfected the ability to turn down an application in a way that would not violate any constitutional provisions,[138] the issuance of bonds for a religious institution would raise the issue of whether the reasonable observer would perceive the bond issuance as government support for the advancement of religion. The name of the bonds—for example, "City of Yourtown Revenue Bonds (The Main Street Church Project)"—would evidence a troubling symbolic link between the government and the benefited religious institution. Imagine that the issue were exacerbated by the church's decision to post a sign in front of its building saying the following:

> *The Main Street Church thanks the City of Yourtown for its support of our church and our congregation by its issuance of City of Yourtown Revenue Bonds (The Main Street Church Project) to finance the construction of*

138. For example, selections of religious institutions could not violate the Equal Protection Clause. *St. Paul's Protestant Episcopal Church*, 1998 WL 1657172, at *7–*8.

> *our new sanctuary. Mayor Mary Smith of the City of Yourtown has approved construction of the sanctuary and the bonds issued to finance that construction. Her approval was required to satisfy Section 147(f) of the Internal Revenue Code of 1986, as amended.*

While the church's statements would be true, only bond lawyers, public officials familiar with conduit bonds, and bond purchasers would understand the significance of any disclaimer. Participants in the tax-exempt bond market will comprehend the indirect nature of the government subsidy. The concept that a conduit bond issue does not pledge the taxing power of the government might be difficult to convey to the public.

Justice O'Connor has expressed concern about the public's perception of government support for religious institutions, suggesting that she would examine closely whether the structure of a conduit loan would cause the reasonable observer to perceive the issuance of bonds as government support for the advancement of religion. Concurring in *Lynch v. Donnelly*,[139] for example, she said, "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[140] Similarly, dissenting in *Agostini*, Justice Souter asserted, "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines."[141] Addressing the issue of perception in *Agostini*, and writing for the majority, Justice O'Connor rejected the idea that placing a public school employee on a parochial school campus to provide remedial education to disadvantaged children created an impermissible symbolic link between the government and religion.[142] Concurring in *Mitchell*, Justice O'Connor distinguished between a program of

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139. 465 U.S. 668 (1984).

140. *Id.* at 692.

141. Agostini v. Felton, 521 U.S. 203, 242 (1997) (Souter, J., dissenting) (citations omitted).

142. *Id.* at 223–24.

true private choice, where "endorsement of the religious message [was] reasonably attributed to the individuals who select[ed] the path of the aid,"[143] and a per capita aid program, in which, "if the religious school [used] the aid to inculcate religion in its students, it [was] reasonable to say that the government [had] communicated a message of endorsement."[144] In the latter case, "the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion."[145] The majority in *Zelman* spoke to this concern of Justice O'Connor, explaining that, with respect to vouchers, "Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[146]

These Justices' focus on the importance of perception reflects a concern about the potential for a government action to foster "[p]olitical fragmentation and divisiveness on religious lines."[147] Although recent cases have minimized the importance of the avoidance of religious conflict,[148] *Lemon* and cases relying on *Lemon* identify avoiding divisiveness as one purpose of the Establishment Clause's proscription against laws respecting an establishment of religion. Justices Souter, Stevens, Ginsburg, and Breyer have alluded to religious strife in recent dissents. In their view, the Establishment Clause and Free Exercise Clause reflected the Framers' intention to prevent "the religious strife that had long plagued the nations of Europe."[149] Justice Breyer, with Justices Stevens and Souter joining, embraced earlier Establishment Clause analysis in cases which "recognized the anguish, hardship and bitter strife that could come when zealous religious groups struggle[d]

143. Mitchell v. Helms, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring in the judgment).

144. *Id.* (O'Connor, J., concurring in the judgment).

145. *Id.* (O'Connor, J., concurring in the judgment).

146. Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002).

147. Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).

148. *See, e.g.*, *Zelman*, 536 U.S. at 661 n.7 (deriding Justice Breyer's concerns that Ohio's school voucher program would result in discord).

149. *Id.* at 718 (Breyer, J., dissenting).

with one another to obtain the Government's stamp of approval."[150] Similarly, in his dissent in *Zelman*, Justice Stevens wrote:

> Admittedly, in reaching [the] conclusion [that the decision in *Zelman* is profoundly misguided] I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.[151]

An early state court case examined the issue of political fragmentation in the context of tax-exempt bonds. Focusing on the neutrality of the statute, the court dismissed the possibility of religious strife as a result of issuance of tax-exempt bonds for a sectarian hospital. *Wisconsin Health Facilities Authority*[152] found that political divisiveness, potentially present if the institutions of only one religious group were favored, would not exist where a broad range of religious and non-religious institutions were eligible for aid in the form of tax-exempt bond financing. In that situation, the court rejected the argument "that potential competition among hospitals would generate controversy and would invite charges of religious discrimination where a nonreligiously aligned hospital was aided in preference to a religiously aligned hospital or one denomination was favored over another denomination."[153]

A sectarian institution seeking tax-exempt financing assistance for religious improvements would need to convince the court that a reasonable observer would be aware of the secular purposes of the bond financing statute, in spite of the title of the

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150. *Id.* (citations omitted).
151. *Id.* at 685–86 (Stevens, J., dissenting).
152. 280 N.W.2d 773 (Wis. 1979).
153. *Id.* at 782.

bonds. The court would need to address the public's perception of a financing for a religious institution and whether the bond issuance created a symbolic link between the benefited religious institution and the government. Statements in the bonds themselves and in the official statement or other disclosure document for the issue indicating that the bonds were not a pledge of the full faith and credit of the government, that no taxes would be levied to pay debt service on the bonds, that no recourse existed against the government for non-payment, that the bonds were issued for a secular public purpose, and that the issuance of the bonds was not the equivalent of government sanction of the religious tenets of the benefited institution would facilitate a conclusion that the financing was purely a conduit and not an endorsement of religion. Adding similar statements to the notice of public hearing and to the applicable elected official's certificate approving the bonds would bolster the perception that no government support for the advancement of religion existed.[154]

Resolving the issue of government selection would be critical. Cases that discount the importance of the government's power to choose projects for conduit financing do not answer the question why federal law requires government approval to create the bonds' tax-exempt status. If state and federal statutes allowed

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154. See the discussion in the district court's opinion in *Steele v. Industrial Development Board*, 117 F. Supp. 2d 693, 730–734 (M.D. Tenn. 2000), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003), of the perception of government endorsement of religion, in which the court objected to the lack of disclaimers in the official statement disassociating the government instrumentality from the descriptions of the religious tenets of the benefiting university. Cases concerning holiday displays at government buildings have reached differing, fact-based conclusions concerning whether holiday displays constitute Establishment Clause violations, because they convey the perception of government endorsement of a particular religion. *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 601–02 (1989); Lynch v. Donnelly, 465 U.S. 668, 683 (1984). This issue of public perception also arises with respect to invocations and other prayers at government meetings, *see* Marsh v. Chambers, 463 U.S. 783, 786 (1983) (finding no government imprimatur), and at high schools. *See* Lee v. Weisman, 505 U.S. 577, 590 (1992) (finding that prayer at a middle school graduation "bore the imprint of the State").

issuance of tax-exempt bonds by religious institutions and other 501(c)(3) corporations for any of their permitted purposes without directly involving government authorization and approval of the bonds, then no imprimatur of government approval would exist.[155] Congress has made the determination, however, that governmental involvement is necessary to confer tax exemption. This requirement precludes reaching an easy conclusion that conduit financings for religious institutions would not have a primary effect of advancing or inhibiting religion on the ground that the issuance of bonds would not result in governmental indoctrination. It would be difficult to maintain that the government's issuance of tax-exempt bonds for the benefit of a religious institution did not violate the Establishment Clause unless other *Agostini* factors, such as the nature of the aid, could negate the appearance of governmental indoctrination that the title and structure of a conduit loan to a religious institution would convey.[156]

(2). The Statute May Not Have a Primary Effect of Advancing or Inhibiting Religion by Creating an Excessive Entanglement Between Church and State

This section will discuss the excessive entanglement prong of the *Lemon-Agostini* test. Excessive entanglement involves consideration of the character and purposes of the institution benefited, the nature of the aid, and the resulting relationship between government and religious authority.

(a). Excessive Entanglement Involves the Consideration of the Character and Purposes of the Institution Benefited

The character of a religious institution is pervasively sectarian, and its purpose includes religious indoctrination.[157] To

155. *See* Spina, *supra* note 15, at 49–50.

156. *See infra* Section III(B)(2)(b).

157. Courts have used a variety of criteria to determine whether a particular institution is pervasively sectarian. *See supra* note 6; *see also* Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 706 (M.D. Tenn. 2000), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003)

avoid excessive entanglement between church and state, the Supreme Court has stated that it would invalidate direct aid to a pervasively sectarian institution, even if the aid itself were secular.[158] Recent cases suggest, however, that a plurality of the Supreme Court is ready to abandon the pervasively sectarian test entirely,[159] so that the pervasively sectarian nature of a religious institution would not automatically invalidate aid to the institution. Thus, the plurality opinion of Justices Thomas, Rehnquist, Scalia, and Kennedy in *Mitchell* stated, "[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[160] The *Mitchell* plurality rejected the importance of examining whether an institution was pervasively sectarian,[161] describing the test as one with "a shameful pedigree,"[162] "born of bigotry [that] should be buried now."[163] The plurality viewed the examination of a person's beliefs required by a focus on whether a school was pervasively sectarian as offensive and contrary to the viewpoint discrimination cases[164] discussed below.[165]

Federal appeals courts and at least one state supreme court have applied the reasoning of the *Mitchell* plurality to uphold tax-exempt bonds for sectarian schools. Relying on the plurality

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(describing cases enunciating tests that determine whether an organization is pervasively sectarian). These factors indicate that a church, synagogue, mosque, or temple is pervasively sectarian, and this article will treat the issue as settled.

158. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 (1976).

159. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 408–09, *cert. denied*, 537 U.S. 1188 (2003).

160. Mitchell v. Helms, 530 U.S. 793, 827 (2000) (plurality opinion).

161. The Court focused on the factors relating to government indoctrination or definition of aid recipients by reference to religion and not on the question of whether the schools receiving loans of materials were pervasively sectarian. The Court did not examine excessive entanglement or purpose, since petitioners did not raise those issues.

162. *Mitchell*, 530 U.S. at 828 (plurality opinion). The Court's reference was to anti-Catholic sentiment. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193–251 (2002).

163. *Mitchell*, 530 U.S. at 829.

164. *Id.*

165. *See infra* Section IV.

opinion in *Mitchell*, *Steele* and *Johnson* cast doubt upon the importance of the pervasively sectarian nature of the benefited institution in examining tax-exempt bond financings for sectarian schools. While the judges writing for the majority in *Steele* and *Johnson* felt constrained by the fact that a majority of the Supreme Court has not disavowed the pervasively sectarian rule, Judge Nelson, concurring in *Johnson,* relying on *Mitchell,* "register[ed] a lack of enthusiasm for any suggestion that conduit financing of the sort provided by the Oakland County Economic Development Corporation would necessarily violate the Establishment Clause if extended to a 'pervasively sectarian' educational institution."[166] Similarly, in *Steele*, the Sixth Circuit questioned the vitality of the pervasively sectarian test in light of the plurality opinion in *Mitchell.* Because a majority of the Supreme Court had not repudiated the pervasively sectarian test, the Sixth Circuit declined to hold that the pervasively sectarian doctrine was no longer good law. The court concluded instead that, given the nature of the aid in question, the issuance of the bonds did not offend the Establishment Clause.[167]

In *Virginia College Building Authority v. Lynn*,[168] the Virginia Supreme Court determined that Regent University was pervasively sectarian,[169] but identified forms of aid to pervasively sectarian institutions that the Supreme Court had approved, such as the loan of educational materials in *Mitchell,* the provision of public school teachers to provide remedial education upheld in *Agostini*, the state funded sign language interpreter in *Zobrest*, and the income tax deduction for tuition, textbooks, and transportation upheld in *Mueller.*[170] In those cases, the *Lynn* court said, the Supreme Court had upheld assistance based upon the nature of the aid the government provided. As discussed below, the *Lynn* court, using the Footnote 7 analysis, determined that the nature of the aid

166. Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 518 (Nelson, J., concurring) (citations omitted).

167. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 409, *cert. denied*, 537 U.S. 1188 (2003).

168. Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000).

169. *Id.* at 698.

170. *Id.* at 694–95.

in a conduit issue did not preclude aid to a pervasively sectarian university.[171]

Thus, courts have begun to consider the relevancy of *Hunt*'s pervasively sectarian test. It appears that four members of the Supreme Court, Chief Justice Rehnquist and Justices Thomas, Scalia, and Kennedy, would be willing to reexamine whether *Hunt's* reliance on the non-pervasively sectarian nature of the college receiving tax-exempt bond proceeds was necessary to upholding the validity of the tax-exempt bonds in that case.

The views of the dissenting and concurring Justices in *Mitchell* will be critical to a court's resolution of the issue, since Justices O'Connor, Souter, Stevens, Ginsberg, and Breyer continue to resist direct aid to pervasively sectarian institutions.[172] In addition to stating her concern in *Mitchell*[173] about whether the reasonable observer would perceive an aid program as government support for the advancement of religion, for example, Justice O'Connor expressed discomfort with the plurality's reliance on the neutrality of an aid statute and with the plurality's apparent willingness to allow actual diversion of government aid to religious indoctrination.[174] Thus, the nature of the aid the state provides in a tax-exempt financing, discussed below, will be a significant consideration in validating tax-exempt bonds for religious

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171. The court also prohibited the use of bond proceeds to finance chapels or the divinity school, but based its prohibition upon Virginia constitutional and statutory prohibitions and upon an express prohibition in the bond resolution. *Id.* at 699. The court's adoption of the Footnote 7 analysis, as discussed below, indicates that, in the absence of those state law restrictions, the court would have permitted financing of religious facilities. *See infra* note 241.

172. *See supra* note 47 and accompanying text (discussing the use of Supreme Court precedent). Until the Supreme Court addresses the question of the validity of tax-exempt bonds for religious projects, lower courts must ground their determinations of the issue in those propositions agreed to by a majority of the Supreme Court. As a result of this rule, any decision by a lower court with respect to such tax-exempt bonds is likely to be appealed to the Supreme Court.

173. Mitchell v. Helms, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring in the judgment).

174. *Id.* at 837–38 (O'Connor, J., concurring in the judgment).

institutions.

(b). Excessive Entanglement Involves the Consideration of the Nature of the Aid the State Provides

Proceeds of government bonds issued to finance a project for a sectarian institution unquestionably would be used for religious purposes. Therefore, a court would need to examine whether the nature of the aid in a tax-exempt bond financing constituted a diversion of government funds to support religion and created an excessive entanglement between church and state. The religious institution could concede that the purpose of the Establishment Clause was to prevent the government from compelling citizens to write a check to a religious institution, and still contend that a conduit issue was not the equivalent of forcing citizens to contribute their money to the support of a religious institution.[175]

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175. *See* JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al eds., 1973). In this influential tract, Madison asserted:

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

Everson v. Bd. of Educ., 330 U.S. 1, 67 (1947) (quoting JAMES MADISON, *supra*, at 300). Madison's *Remonstrance* appears to retain its influence on some members of the Court. *See, e.g.*, Mitchell, 530 U.S. at 870–71 (Souter, J., dissenting). A direct grant of money to a religious institution to support its religious mission appears to remain impermissible for the moment. Justice Thomas acknowledged in *Mitchell* that " 'special Establishment Clause dangers' " exist "when *money* is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Id.* at 818–19 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)) (emphasis in original). As Justice Souter pointed out in his dissent, however, Justice Thomas's logic indicates that he would consider direct aid to religious

The plurality in *Mitchell* explained that, so long as the aid had no religious content and eligibility was determined in a constitutionally permissible manner, use of the aid to indoctrinate would not be attributable to the government.[176] The Court noted that the actual use of funds in *Zobrest* to fund a sign language interpreter and in *Witters* to fund tuition reimbursement for a blind person training for the ministry was not held unconstitutional, even though "[d]iversion was guaranteed."[177] Thus, under the plurality opinion, a court validating tax-exempt financing for a religious institution would need to conclude that the aid provided to the religious institution did not have impermissible content.

One possibility would be to view the content of the "aid" as money—proceeds of a government bond issue—that the religious institution was inevitably and impermissibly diverting to religious use.[178] Under this analysis, the court might view the loan of money certain to be converted to religious use differently from the loan of movie projectors and computers to sectarian schools in *Mitchell*. The plurality upheld that loan, since the materials had no impermissible content, even though they could be diverted to religious use. The question would remain whether the aid being diverted, the proceeds of a conduit bond issue, constituted "government" funds. Since the money used to make the loan to the religious institutions would be furnished by private investors, not by taxpayers, and the loan would be repaid solely from revenues of the religious institution and not from government funds, the court could conclude that no unlawful diversion of government funds had occurred. Under this analysis, the "aid" might be considered the provision of the governmental service of tax exemption[179] for

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institutions to be acceptable so long as it were made available on a neutral basis. *Id.* at 900 (Souter, J., dissenting).

176. *Mitchell*, 530 U.S. at 820.

177. *Id.* at 821.

178. This issue would be of greatest concern in a state that considered the lending of bond proceeds to be a lending of the state's credit to the benefited religious institution, but as discussed below, the question would need to be considered even in the absence of such a state rule in order to address the issues the *Mitchell* concurrence raised.

179. *See supra* note 41 and accompanying text (quoting *Hunt*'s

projects that met the secular purpose of the statute. Like the movie projectors and computers lent to secular schools in *Mitchell,* the aid itself, namely, the provision of tax exemption, would have no religious content that could be attributed to the government. No government indoctrination would take place, since the purpose of the government assistance would be to fulfill the government's secular objectives. Like the interpreter in *Zobrest*, the government would not be inculcating a religious message, but merely providing a service comparable to the service it provided to other nonprofit entities that furthered the state's public purpose. Under this analysis, provision of aid in the form of a tax-exempt loan to a pervasively sectarian institution would not violate the Establishment Clause.

The Supreme Court has not addressed the question directly. *Roemer*,[180] which upheld direct government aid to sectarian institutions that were not pervasively sectarian, indicated that the Supreme Court viewed *Hunt*,[181] the leading case upholding the issuance of conduit bonds for a sectarian college, as establishing the rule that state aid may not benefit a pervasively sectarian institution. By relying on *Hunt*, *Roemer* implied that aid in the form of tax-exempt bond proceeds could not benefit a pervasively sectarian institution. The majority in *Johnson* also interpreted *Hunt* as explicitly prohibiting the issuance of tax-exempt bonds for a pervasively sectarian institution. It noted that a majority of the Supreme Court had not disavowed the pervasively sectarian test and that "it [was] Justice O'Connor's opinion, which [did] not abolish the distinction between 'pervasively sectarian' and 'sectarian' institutions... that [was] controlling upon [the] Court."[182] As noted by the district court in *Steele*, the Supreme Court in *Rosenberger* "implicitly recognized the bond proceed loan structure in [*Hunt*] as an example of direct state aid" by citing *Hunt* for the proposition that "special Establishment Clause dangers

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Footnote 7).

180. Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976).

181. Hunt v. McNair, 413 U.S. 734 (1973).

182. Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 510 n.2.

[exist] where the government makes direct money payments to sectarian institutions."[183]

Hunt, however, stands for a proposition that is the inverse of the rule described in *Roemer*, *Johnson*, and *Rosenberger*. *Hunt* held that the issuance of tax-exempt bonds for the benefit of a sectarian college would not have the primary effect of advancing or inhibiting religion, because the evidence showed that the college was not pervasively sectarian and the project being financed was subject to a restriction against religious use. The Court established these factors as sufficient to determine that the statute did not have a primary effect of advancing or inhibiting religion. *Hunt*, however, neither held that *only* transactions meeting these requirements would be upheld nor that tax-exempt bonds could not be issued to fund religious activities. Rather, in Footnote 7, the Court reserved the question whether the tax exemption was comparable to the local property tax exemption for religious institutions that *Walz*[184] upheld.[185]

Embracing the Footnote 7 analysis and allowing tax-exempt bond proceeds to benefit a religious institution would not require the Supreme Court to overrule *Hunt*. Instead, the Court would need to recast its holdings in *Roemer* and *Hunt* to make clear that tax-exempt bond financings were excluded from the prohibition against providing aid to pervasively sectarian institutions. *Steele* would provide the Supreme Court the outline of the argument. *Steele* relied upon a line of Supreme Court cases, beginning with *Walz*, which upheld tax exemptions for religious property and tax deductions for taxpayers contributing to religious institutions as not violative of the Establishment Clause.

In *Walz*, the Court upheld a real property tax exemption that extended to property used exclusively for religious, educational, or charitable purposes and owned by a nonprofit entity

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183. Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 719–20 (M.D. Tenn. 2000) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003).

184. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

185. The *Johnson* majority also found it unnecessary to reach the issue concerning the nature of the aid. *Johnson*, 241 F.3d at 511 n.3.

organized for religious, educational, or charitable purposes. The Court rejected the argument that the grant of an exemption indirectly coerced taxpayers to make a contribution to religious bodies and thereby violated provisions prohibiting establishment of religion under the First Amendment. The Court concluded that "the grant of a tax exemption [was] not sponsorship since the government [did] not transfer part of its revenue to churches, but simply abstain[ed] from demanding that the church support the state."[186]

Relying on *Walz*, *Mueller v. Allen*[187] stated that an indirect financial benefit conferred by a religiously neutral tax deduction did not violate the First Amendment. In *Mueller*, the Court upheld a tax deduction for amounts paid as school tuition, textbooks, and transportation for public and private schools. The *Mueller* Court acknowledged that religious institutions benefited substantially from the allowance of the deduction and that the economic effect was comparable to aid given directly to the schools. The Court, however, also noted that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[188] Moreover, the receipt of an indirect, neutrally available benefit did not require the conclusion that an Establishment Clause violation had occurred.[189] State courts have also upheld tax exemptions benefiting religious institutions, rejecting the argument that tax exemptions force owners of non-exempt property to support religious institutions by increasing the rate of taxation against non-exempt properties in order to raise moneys not collected from tax-exempt religious institutions.[190]

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186. *Walz*, 397 U.S. at 675.

187. 463 U.S. 388 (1983).

188. *Id.* at 396 (quoting Regan v. Taxation Without Representation of Wash., 461 U.S. 540, 547 (1983)).

189. *Id.* at 400. Similarly, courts have upheld income tax deductions for contributions to religious institutions. A religious institution could argue that because the Justices have approved the indirect benefit of income tax deductions for contributions to religious institutions, which encourages donations to religious institutions, they should approve the tax exemption of the interest on conduit bonds for religious institutions, which would encourage individuals to make loans to the religious institutions by purchasing bonds.

190. Gen. Fin. Corp. v. Archetto, 176 A.2d 73 (R.I. 1961). *Archetto*

Courts examining tax-exempt bonds have recognized, in considering taxpayer standing issues, that other taxpayers' taxes might increase if a state or local government chose to replace the tax revenues it would have received through a taxable bond issue.[191] The plaintiffs in *Steele* had argued that they were required to support the sectarian school, since their state and local taxes were increased proportionately to offset the bondholders' exemption from taxation. Similarly, the taxpayer objecting to the issuance of bonds in *Johnson* estimated that, because the tax exemption saved the sectarian school over $1 million, the state of Michigan lost $68,400 in state tax revenue as a result of the exemption from state income tax on interest paid to Michigan bondholders.[192] The court agreed that this loss of state revenue was a sufficient "good-faith pocketbook injury"[193] to confer standing upon the taxpayer to contest the constitutionality of the issuance of bonds for the school.[194]

In spite of granting taxpayers standing to sue, recent decisions, including *Steele*, have distinguished between impermissible grants of money that subsidize religious institutions and tax exemptions. These courts have relied on *Walz* to uphold the issuance of tax-exempt bonds for religious schools on the ground that tax-exempt bonds were analogous to an indirect

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noted that the sovereign power of the state gave it wide discretion to create exemptions from taxation that the courts could invalidate only if "so outrageously subversive of all the rules of fairness, as not to come so far within the purview of this general clause, [requiring that the burdens of the state ought to be fairly distributed among its citizens, R.I. CONST. art. I, § 2] as to enable the court to save the citizen from oppression by declaring it to be void." *Id.* at 75 (relying on *In re* Dorrance-Street, 4 R.I. 230, 249 (1856)). The court also noted the historic practice of granting tax exemptions to churches in Rhode Island that predated the adoption of the Rhode Island Constitution. *Archetto*, 176 A.2d at 77.

191. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 403, *cert. denied*, 537 U.S. 1188 (2003).

192. Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 506.

193. *Id.* at 507 (quoting Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952)).

194. *Id.* at 507–09.

financial benefit conferred by a religiously neutral tax or deduction.[195] In *Steele*, the court acknowledged that in a conduit financing, the potential loss of tax revenue had an impact upon public funds[196] but, citing *Walz*, differentiated between subsidies and tax exemptions.[197] The court in *Johnson* also cited *Walz* and rejected the argument that "issuance of revenue bonds [allowed] government funds to reach the coffers of the [sectarian school] . . . because [it] relieve[d] the [school] of costs it otherwise would have borne and the [school] [was] thereby free to devote those resources towards its sectarian activities."[198] The court noted that that argument had been repeatedly rejected, and quoting *Roemer*,[199] explained, "If this were impermissible . . . a church could not be protected by the police and fire departments."[200]

The lack of a cash subsidy was also important to the Virginia Supreme Court in *Lynn*,[201] which upheld the issuance of conduit bonds for a pervasively sectarian university. The court rejected the idea that a pervasively sectarian institution could not benefit from the issuance of tax-exempt bonds, relying on the Footnote 7 concept that the nature of the aid in a conduit financing does not implicate the Establishment Clause. The court focused on the fact that no government funds were spent or pledged for payment of the bonds, that the financing was available to all qualified institutions without regard to religion, that there were assurances in the bond documents that the funds would not be used for religious instruction, and that the source of funds was bond proceeds which the court categorized as "the result of independent

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195. *Steele*, 301 F.3d at 413. Compare, however, *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 280 N.W.2d 773, 779 (Wis. 1979), which distinguished *Walz* on the grounds that "there [was] no line of historical precedent to demonstrate that this financing arrangement [would] not have a detrimental effect on the relationship of church and state" and that "the [bond financing statute did] not restrict the involvement of state government with religion, as did the exemption approved in *Walz*." *Id.*

196. *See Steele*, 301 F.3d at 403.

197. *Id.* at 410 (citations omitted).

198. *Johnson*, 241 F.3d at 515.

199. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 (1976).

200. *Johnson*, 241 F.3d at 515 (emphasis omitted).

201. Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000).

choices of private investors."[202] The court concluded that the issuance of bonds did not violate the Establishment Clause, because no government funds flowed to the university.[203]

Thus, *Steele*, *Johnson*, and *Lynn* held that the nature of the aid in a conduit financing was significant in determining whether an Establishment Clause violation existed and distinguished between tax exemptions and direct subsidies. Although the courts focused on the economic realities of tax-exempt bond issues in determining that bondholders, not government issuers, were the actual lenders in the conduit financings they examined, they were not troubled by the economic reality of the enormous support that the tax-exempt bonds provide to sectarian institutions. These courts appeared to view the link between the loss to the treasury that occurred as a result of the issuance of tax-exempt bonds and the benefit to the religious institution as too attenuated to constitute direct financial support.[204] In contrast, the dissent in *Steele* objected to ignoring the significant economic support that tax-exempt financing provides, enabling the institution to advance its sectarian mission, a benefit that could not be obtained without government participation.[205]

The U.S. Supreme Court has not considered the issue directly. The Justices' attitudes about subsidies have varied when examining traditional tax exemptions. Justice Thomas used the historic acceptance of property tax exemptions as an argument for validating direct aid to religious institutions, noting that "[a] tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy."[206] In *Regan*, the Court characterized "tax exemptions and tax-deductibility [as] a form of subsidy that is administered through the tax system,"

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202. *Id.* at 698.

203. *Id.*

204. The direct benefit of increasing certain citizens' taxes to produce the same total revenue for use by the government would accrue to bondholders, not to the religious institution. The indirect benefit of a lower interest rate on its borrowing would accrue to the religious institution.

205. Steele v. Indus. Dev. Bd., 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, 438 (Clay, J., dissenting), *cert. denied*, 537 U.S. 1188 (2003).

206. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 859 (1995) (Thomas, J., concurring).

observing that "[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income [and that] [d]eductible contributions are similar to cash grants of the amount of a portion of the individual's contributions."[207] The Court noted, however, citing *Walz*, that tax exemptions and deductions were not identical to cash subsidies.[208]

Nyquist,[209] decided on the same day as *Hunt*, struck down a statute that provided tax deductions for parents in certain income ranges whose children attended elementary or secondary nonpublic schools. Justice Souter, dissenting in *Zelman*, asserted that *Nyquist* "held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses."[210] The majority in *Zelman* limited *Nyquist*, however, categorizing the unconstitutional statute as one that the Court invalidated because its sole purpose was to provide financial support for nonpublic sectarian institutions. The Court explained that the rule in *Nyquist* "[did] not govern neutral educational assistance programs that, like the [voucher] program [considered in *Zelman*] offer[ed] aid directly to a broad class of individual recipients defined without regard to religion."[211] Using the majority's approach, the Supreme Court could distinguish the *Nyquist* statute from the typical conduit statute that provides aid to a broad range of entities that fulfill the statute's valid public purpose. The resolution authorizing a particular bond issue for a religious institution, however, would be enacted for the sole purpose of benefiting the religious institution and could therefore be considered a law "respecting an establishment of religion" under *Nyquist*.

Even if the Supreme Court limited *Nyquist* to its facts, it would need to examine further the nature of a tax-exempt bond issue. The exemption of church property and the allowance of

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207. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983).

208. *Id.* at 544 n.5.

209. Nyquist v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 756 (1973).

210. Zelman v. Simmons-Harris, 536 U.S. 639, 693 (2002) (Souter, J., dissenting).

211. *Id.* at 661–62.

deductions for contributions to religious institutions, or for expenditures at religiously affiliated primary and secondary schools, are not directly analogous to a tax exemption granted to bondholders. One difference is the justification for the tax exemption. *Nyquist* explained that historic practice justified property tax exemptions for religious institutions.[212] *Walz*[213] and *Nyquist*[214] also explained that property tax exemption avoided the appearance of compulsory support of the government by religious institutions through taxation of church property. Another purpose of the exemption of church property from taxation was the avoidance of unseemly government involvement in foreclosing on a church to collect delinquent taxes. In contrast, if the law permitted governments to issue taxable conduit bonds for religious institutions, and bondholders neglected to pay taxes on their interest income, government officials prosecuting tax delinquencies would interact with the bondholders, not with the religious institution benefiting from the issuance of the bonds.

Steele's reliance on *Mueller* in its discussion of the nature of the aid also weakens the argument that tax exemption falls in a different category from direct expenditure of government funds. In *Mueller*, aid reached the sectarian schools as a result of the choices of individual parents. No exercise of governmental discretion comparable to the approval of the bonds in a conduit financing took place.[215] Similarly, individual donors, not a government entity, choose which religious institutions benefit from tax-deductible contributions. In addition, *Mueller* did not address the constitutionality of financing religious facilities, since the tax deduction was not available to parents for the purchase of specifically religious books.[216] Therefore, a court would be required to distinguish *Mueller* by characterizing the aid in a tax-exempt financing as non-governmental.

Mitchell and *Zelman* offer some guidance as to the Justices'

212. *Nyquist*, 413 U.S. at 792.
213. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).
214. *Nyquist*, 413 U.S. at 793.
215. Mueller v. Allen, 463 U.S. 388, 400 (1983).
216. *Id.* at 391 n.1.

possible views. Justice O'Connor's concurrence in *Zelman* and Justice Souter's dissents in *Mitchell* and *Zelman* left open the possibility that they would conclude that, because no taxpayer funds would be directly expended for religious activities when a government instrumentality lent bond proceeds to a religious institution, no Establishment Clause violation would occur. Justice O'Connor approved school vouchers even though she recognized that the voucher case was "different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach[ed] religious schools without restrictions on the use of these funds."[217] In buttressing her argument that a state school voucher program was not a radical departure from prior cases upholding government support for religious institutions, Justice O'Connor cited, as examples of tax policies that "confer a significant relative benefit on religious institutions," exemptions of religious organizations from state property taxes, federal corporate income tax, state corporate income tax in many states, federal tax deductions for charitable contributions to qualified religious groups, and federal and state tax credits for educational expenses, including expenses for attending religious schools.[218]

In *Mitchell*, Justice Souter cited *Hunt* and, in particular, the description of tax-exempt financing in Footnote 7, as an example of approved aid that did not violate the constitutional prohibition against diversion of government funds.[219] Similarly, in his dissent in *Zelman*, Justice Souter, with whom Justices Stevens, Ginsburg, and Breyer joined, distinguished between a tuition voucher program, "[an unconstitutional] scheme that systematically provides tax money to support the schools' religious missions,"[220] and benefits in the form of tax exemption or deduction. In examining the relevance of Justice O'Connor's emphasis in her concurrence in *Zelman* on how substantial the aid might be, Justice Souter distinguished between direct aid to sectarian schools for religious

217. Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring).

218. *Id.* at 665 (O'Connor, J., concurring).

219. Mitchell v. Helms, 530 U.S. 793, 891–92 (2000) (Souter, J., dissenting).

220. *Zelman*, 536 U.S. at 686 (Souter, J., dissenting).

teaching and the tax exemptions upheld in *Walz* and *Mueller*, even though those government benefits were significant.[221]

Thus, Justice O'Connor in *Zelman* and Justice Souter, dissenting in *Mitchell*[222] and in *Zelman*,[223] have identified the indirect aid of a tax exemption as acceptable, suggesting that a tax-exempt bond issue for the benefit of a religious institution might not violate the Establishment Clause. Although these arguments lead to the conclusion that the form of the aid determines constitutionality, the issue remains whether the government's role in selecting the religious institutions that benefit from tax-exemption and in contracting with the religious institution to make a loan of bond proceeds implicates the Establishment Clause.[224]

(c). Excessive Entanglement Involves the Consideration of the Resulting Relationship Between Government and Religious Authority

Issuing tax-exempt bonds would not result in the kind of excessive entanglement between the government and religious authority that recent cases have discussed.[225] If the Supreme Court

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221. *Id.* at 709 n.19 (Souter, J., dissenting).

222. Justices Stevens and Ginsburg joined Justice Souter in dissent.

223. Justices Stevens, Ginsburg, and Breyer joined Justice Souter in dissent.

224. *See supra* Section III(B)(1)(d).

225. Hunt v. McNair, 413 U.S. 734, 745–49 (1973). In *Hunt*, the Court approved much more intrusive monitoring against improper use than the typical loan agreement requires at present. To some degree, the lack of monitoring by the government instrumentality results from a change since the decision in *Hunt* in the way tax-exempt financings are structured. Initially, many conduit financings were structured as lease transactions with title to the financed property transferring to the public body and then being leased back to the benefited institution. Like the financing discussed in *Hunt*, *see supra* note 36, the transactions on the surface appeared to be traditional real estate leases with the government as lessor and conduit borrower as lessee. These lease statutes may have reflected the beliefs of state legislators, accustomed to traditional government bonds, that in order to obtain a federal tax exemption, the conduit bonds were required to be government bonds and the projects were required to be owned by the government in order to demonstrate that they served a public purpose. At present, typical transaction documents no

accepted the Footnote 7 concept that tax-exempt financing is an indirect government service, then *no* monitoring against religious use would be required. The indirect nature of the subsidy would eliminate the Court's concern about religious use. The actual use of proceeds for religious purposes would not be relevant so long as the government issuer had initially determined that the financing fulfilled the secular purpose of the statute.

(3). The Statute May Not Have a Primary Effect of Advancing or Inhibiting Religion by Defining Its Recipients by Reference to Religion

A neutral bond financing statute would not on its face define beneficiaries by reference to religion. A government issuer's bond resolution authorizing the issuance of bonds for the benefit of a religious institution might be deemed to define the beneficiary of the borrowing with reference to religion. Local governments could assert, however, that the bond resolution benefiting the religious institution was one of a series of resolutions it had adopted to meet its secular goals.

Addressing the portion of the *Lemon-Agostini* test that assesses whether recipients of government benefits are defined by reference to religion, the court in *Johnson*, examining a bond financing statute, focused on whether the criteria for allocating the aid created a financial incentive to undertake religious indoctrination.[226] The court, quoting *Agostini*, said that such an incentive was "not present . . . where the aid [was] allocated on the basis of neutral, secular criteria that neither favor[ed] nor

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longer require government surveillance to ensure that contractual promises against religious use are met, although inspections for such purposes are occasionally specifically authorized. The Court in *Hunt* was not troubled by lease provisions that allowed the governmental agency to inspect the project to ensure that the covenant against religious use was honored or that allowed the government to take over the project in the event of default. The Court, therefore, determined that the lease would not result in an unconstitutional degree of entanglement between the state and the college. *Id.*

226. Johnson v. Econ. Dev. Corp., 2001 FED App. 0015P (6th Cir.), 241 F.3d 501, 514.

disfavor[ed] [religious beneficiaries], and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis."[227] The court identified the bondholders, who were not defined by reference to religion, as the beneficiaries of government aid and held that the issuance of tax-exempt bonds "in no way create[d] a financial incentive for the bondholders who actually receive[d] the [tax] exemption to favor religious entities over non-religious entities."[228] In *Mitchell*,[229] the Court noted that simply reducing the cost of securing a religious education did not create an incentive to attend a religious school. Similarly, state statutes reducing the cost to a religious institution of borrowing money would not create a financial incentive to attend a religious institution or to adopt a particular religious doctrine.

Thus, a statute that allows the issuance of conduit bonds for the benefit of both religious and nonsectarian institutions and a local government resolution adopted for the purpose of fulfilling a secular purpose would not have a primary effect of advancing or inhibiting religion, even where the particular government action authorizing the issuance of the bonds for a particular religious institution could be construed as defining the recipients of its benefits by reference to religion.

IV. CONCLUSION

This article has examined possible responses of the current Supreme Court Justices to a case that directly addresses whether a government could issue tax-exempt bonds to finance religious improvements for a church, synagogue, temple, mosque, or other pervasively sectarian institution. In the thirty years since the Supreme Court decided *Hunt*, the "wall of separation between Church and State"[230] has continued to erode.[231] The plurality opinion in *Mitchell* appears to indicate that Justices Thomas, Scalia,

227. *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

228. *Id.* at 515.

229. Mitchell v. Helms, 530 U.S. 793, 814 (2000) (plurality opinion).

230. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)); *cf.* HAMBURGER, *supra* note 162, at 1.

231. *See* Erwin Chemerinsky, *supra* note 9, at 221.

Rehnquist, and Kennedy would adopt the view that indirect aid in the form of a tax-exempt bond issue is a government service that should be made neutrally available to any institution that can fulfill the secular purpose of a bond statute. Justices Breyer, Souter, and Stevens have asserted that the Establishment Clause prohibits laws respecting an establishment of religion and does not merely mandate that all religions have an equal opportunity to benefit from government assistance.[232] Nonetheless, those Justices have joined in opinions that distinguish direct aid from the provision of tax exemption. Similarly, while refusing to embrace the plurality's neutrally available aid doctrine as the sole determinant of the constitutionality of a statute under the Establishment Clause, Justices Souter and O'Connor, joined by Justices Breyer, Ginsburg, and Stevens, have stated that indirect aid in the form of a tax exemption does not implicate the Establishment Clause.[233] Justice Souter's specific reliance on Footnote 7 in *Mitchell*[234] in identifying *Hunt* as a case that did not involve direct government aid suggests that he would include tax-exempt bonds in the category of permissible indirect assistance.

All nine Justices continue, however, to rely upon private choice to uphold government aid to religiously affiliated schools. The bond resolution adopted by the government issuer of the bonds and the applicable elected official's TEFRA approval reflect public, not private, choices. The argument that the private choices made by purchasers of the bonds break the connection between the government and the religious institution cannot be maintained, since under current federal and state law, it is critical that the link not be broken between the issuance of tax-exempt bonds and the advancement of a public purpose. In addition to the obstacles presented by the requirement of *actual* governmental approval, Justices Souter and O'Connor have expressed concerns about the *appearance* of government approval and may find that government sanction of the bonds outweighs the indirect nature of the aid.

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232. Zelman v. Simmons-Harris, 536 U.S. 639, 721–23 (2002) (Breyer, J., dissenting).

233. *Id.* at 665 (O'Connor, J., concurring), 686 (Souter, J., dissenting).

234. *Mitchell*, 530 U.S. at 892 (Souter, J., dissenting).

Thus, the dissenters may conclude that the issuance of tax-exempt bonds to pay for sectarian facilities for a religious institution constitutes the "sponsorship, financial support, and active involvement of the sovereign in religious activity" that the Establishment Clause prohibits.[235]

As tempting as the argument may be that the enormous economic benefit to a religious institution created by a tax-exempt financing constitutes impermissible direct government financial support, that line of reasoning was rejected by the Court in *Everson*, which approved substantial indirect financial aid to sectarian schools by subsidizing transportation costs for parochial school students. *Walz* approved the indirect financial aid to religious institutions that a property tax exemption provides.[236] Subsequent cases approving indirect government support, such as *Agostini* and *Zelman*, have made clear that indirect aid with no religious content can result in significant monetary aid to sectarian schools without constituting unconstitutional direct government financial support.

The indirect nature of the aid in a tax-exempt bond financing should also lessen concern about the active involvement of the sovereign in religious activity. Following the *Lemon-Agostini-Steele* guidelines, the Court would be justified in concluding that bond financing statutes do not have a primary effect of advancing or inhibiting religion.[237] Bond financing statutes do not define recipients of their benefits by reference to religion or create an incentive to undertake religious indoctrination.[238] No excessive entanglement would exist, because the nature of the state aid in the form of provision of tax exemption would make the character and purposes of the institution benefited irrelevant and the resulting relationship between government and religious authority minimal.[239] The fact that aid would be available to any institution that could fulfill the secular purpose of the statute would

235. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
236. *Id.* at 674–75.
237. Agostini v. Felton, 521 U.S. 203, 234 (1997).
238. *See* Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682, 698 (Va. 2000).
239. *See id.*

indicate that any indoctrination that occurred at the religious institution was not attributable to the government.[240]

Reaching the conclusion that no prohibited form of aid is diverted to religious use in a conduit financing would not require repudiation of the pervasively sectarian test with respect to direct state aid or overruling of those cases that rely upon the secular nature of facilities being financed. Overruling *Hunt* would not be necessary, since *Hunt* did not reject the argument concerning the nature of the aid but grounded its holding on the fact that the college was not pervasively sectarian and that no religious facilities were financed. Adopting the Court's reasoning in *Steele* would provide an alternative explanation for the holding in *Hunt* and would extend the reasoning of the Supreme Court set forth in cases decided since *Hunt*. Such a result is not unimaginable, given the Supreme Court's recent Establishment Clause analysis, which, while couched in the language of neutrality, appears to promote and favor religious institutions.[241] Thus, it would not be unreasonable for bond counsel to test the limits of the Supreme Court's neutrally-available-aid interpretation of the Establishment Clause in order to convince a court to validate the issuance of

240. *See id.* at 699.

241. Bond counsel should also be aware that state constitutional provisions may affect the validity of tax-exempt bonds for religious institutions. In *Witters*, for example, the U.S. Supreme Court remanded the case to the state court with the statement that "the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." Witters v. State Comm'n for the Blind, 474 U.S. 481, 489 (1986). The Washington Constitution provides that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I, § 11; *see also Witters*, 474 U.S. at 484 (quoting this provision). The state court in *Witters* then applied the Washington State Constitution to prohibit grant of the scholarship. Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989). In *Lynn*, the Court indicated that state statutes and the state constitution, not the Establishment Clause, precluded issuance of tax-exempt bonds for a divinity school. *Lynn*, 538 S.E.2d at 699. The Supreme Court has held that giving effect to state constitutional provisions that prohibit direct state aid to individuals seeking to use state scholarships to pursue theology degrees does not violate the Free Exercise Clause. *See* Locke v. Davey, 124 S. Ct. 1307, 1315 (2004).

bonds to finance religious projects for a sectarian institution.

The issue remains, however, whether the adoption of a bond resolution by the issuer and the applicable elected official approval would constitute government sponsorship of a religious institution. The issuance of tax-exempt bonds might not constitute direct financial support to a religious institution or actively involve the sovereign in religious activities, but the name of the bonds and the statutory requirement for government issuance of the bonds would connote government endorsement. Federal law requiring that government instrumentalities issue tax-exempt bonds suggests that the indoctrination that occurs at religious institutions supported by tax-exempt bonds would be attributable to the government.[242] By structuring state and federal statutes to involve the government, Congress and state legislatures have determined that the government has a role in deciding which public purposes to support. The need for that government decision precludes a simple conclusion that private individual choices would confer the benefit of tax exemption upon religious institutions.

Even if government sponsorship were not an issue, religious institutions might find that government officials were cautious about participating in these financings. Removing the wall between government instrumentalities and religious institutions would result in government officials having to make uncomfortable decisions favoring and disfavoring religious institutions, fostering strife and divisiveness. That discomfort would be the effect of the active role that the government takes in a conduit financing in selecting which institutions benefit from the government's agreement to participate in a bond issue.[243]

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242. State statutes that authorize governments to create nonprofit corporations or governmental authorities to issue conduit bonds do not solve the appearance of government support since the nonprofit corporations and authorities are government instrumentalities and, in any case, a public official or voters in the project's jurisdiction must also approve the bonds. *See supra* note 16 and accompanying text.

243. The selection process highlights one difficulty of the equal opportunity or neutrality view of the Establishment Clause. The neutrality view presumes a benevolent tolerance by all religious groups towards their competitors and by government officials towards all religious groups. Such

Courts should also be sensitive to the implications of the Supreme Court's viewpoint discrimination cases in the context of tax-exempt financing. In a series of cases characterizing the government as the facilitator of private speech, the Court has invalidated statutes and administrative policies that prohibit religiously affiliated groups from using public forums or obtaining government funding for religious expression when the government program supports secular speech.[244] Although the Supreme Court

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tolerance is not universal. Labeling attempts to distance government from religion as "bigotry" disregards the experience of dissenters and those of minority religious faiths. The neutrality view embraces only the Free Exercise Clause and discounts the words of the Establishment Clause.

244. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), for example, the Court held that denying the use of school facilities to a religious group when the school board had opened school facilities for use after school hours by community groups for social, civic, and recreational purposes and other uses pertaining to the welfare of the community, but not for religious purposes, constituted viewpoint discrimination, since it allowed school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint. *Id.* at 393–94. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court held that a state university's program that authorized payments from a fund composed of mandatory student fees to outside contractors for printing costs of publications of extracurricular student groups related to the educational purpose of the university, other than newspapers that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality," invalidly discriminated against religious groups on the basis of viewpoint. *Id.* at 823. The Court said that the fund was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles [enunciated in *Lamb's Chapel*] [were] applicable." *Id.* at 830. It characterized the newspaper's speech as "*private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," rather than "*government* speech endorsing religion, which the Establishment Clause forbids." *Id.* at 841. *Good News Club* extended the ruling to include use of public school facilities, where the Court said that a school district had created a limited public forum for events "pertaining to the welfare of the community." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 108 (2001). The Court emphasized that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112; *accord* Columbia Union Coll. v. Clarke, 159 F.3d 151, 156 (1998), *cert. denied*, 527 U.S. 1013 (1999).

in *Locke v. Davey*[245] has recently curtailed the reach of the viewpoint discrimination cases, it is not unlikely that, if the Supreme Court were to approve of tax-exempt financing for religious institutions using the Footnote 7 analysis, a religious institution will probe the limits of the "play in the joints"[246] described in *Davey* and bring suit against a government authority to force the issuance of bonds for its benefit. The religious institution would argue that a structure created by statute that allows tax-exempt financing is analogous to a limited public forum "in a metaphysical... sense."[247] It would contend that, under the authority of a statute authorizing financing for a secular public purpose, the government could not silence the expression of selected viewpoints by refusing such assistance to a religious institution whose project fulfilled the statute's secular public purpose.[248] Under this analysis, state and local government issuers would risk liability[249] if they rejected an application for assistance from one religious institution, even for valid, non-discriminatory reasons, while approving an application from another.[250]

245. 124 S. Ct. 1307 (2004). The *Davey* Court rested the decision on "the play in the joints" between the Free Exercise Clause and the Establishment Clause. *Id.* at 1311. The Court rejected the argument that a state's refusal to grant a scholarship to a student seeking a degree in theology under a program providing assistance to all students who met certain financial and scholastic criteria violated the Free Exercise Clause. *Id.* at 1315.

246. *Id.* at 1311.

247. *See Rosenberger*, 515 U.S. at 830.

248. *But see Davey*, 124 S. Ct. at 1313 n.3 (rejecting the viewpoint discrimination argument). The *Davey* Court refused to extend public forum cases to state scholarship programs, holding that the purpose of the scholarship program was "not to encourage a diversity of views from private speakers." *Id.* (quoting United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003) (plurality opinion)).

249. Liability to suit and to damages would depend upon each state's sovereign immunity law.

250. This argument succeeded in *Industrial Development Authority v. Mohler*, 51 Va. Cir. 449 (Va. Cir. Ct. 2000), in which the court held that denying a religious primary and secondary school the benefit of tax-exempt bonds under a neutral program, based on the school's alleged pervasively religious viewpoint, would infringe the school's free speech rights under the First Amendment. The court, citing *Rosenberger*, 515 U.S. at 837, determined that the school seeking tax-exempt financing was not pervasively sectarian,

Interpreting the Establishment Clause to allow issuance of tax-exempt bonds for religious institutions could force governmental authorities to be equal opportunity lenders, negating Congress's intention of allowing local governments to choose which projects to assist. Congress's objective of giving local governments control over the selection of projects benefiting from tax-exempt financing would be frustrated if the courts held that a government instrumentality was subject to the constraints imposed upon a government acting as the facilitator of private speech.[251]

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and thus the free speech infringement was not excused by the necessity of complying with the Establishment Clause. The court made clear that under current Supreme Court jurisprudence it was required to rely on the non-pervasively sectarian nature of the school to validate the bonds, but it appeared to believe that even a pervasively sectarian school could benefit from tax-exempt financing and that denying tax-exempt financing to a pervasively sectarian university would violate the Free Speech Clause. *See Mohler*, 51 Va. Cir. *passim*.

251. In contrast, a government issuer could assert that its responsibility to determine whether a bond issue had a proper public purpose and the required applicable elected official approval would place the government in the category of "government as speaker" in cases relating to the government's expenditure of funds to promote its own message rather than facilitating or encouraging a diversity of views from private speakers. *See Rosenberger*, 515 U.S. at 832–34. Cases characterizing the government as speaker have "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' " Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983) (quoting Cammavan v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–86 (1998) (holding that the NEA can exercise discretion over arts funding decisions without violating the First Amendment); Rust v. Sullivan, 500 U.S. 173, 192–94 (1991) (holding that the government can decline to subsidize programs generally without violating viewpoint discrimination doctrine). Under *Regan*, *Finley*, and *Rust*, an issuer's ability to issue bonds for a given public purpose would not generate rights for religious institutions under the Free Speech Clause or the Free Exercise Clause, since the purpose of the bond financing statute would not be to encourage private speech but rather to promote a government-determined public purpose. The government issuer could select and reject projects of religious institutions without violating the Free Speech Clause or the Free Exercise Clause since the government would not be required to subsidize a religious institution's exercise of its constitutional rights. Instead, the government would argue that it could make distinctions among beneficiaries in order to further proper public purposes that it wished

Thus, the Justices of the Supreme Court must evaluate the appearance of government sponsorship that a conduit bond issue for a religious institution conveys. Even if the Court determines that the role of the government is insignificant in a conduit financing, the Court should recognize the importance of symbolism and the danger of the appearance of government endorsement of religion. The Court should mandate disclosure of the limited role of government at all points of the proceedings. Because of Establishment Clause concerns, plain English statements should be added to official statements, public notices, and financing documents stating that the issuance of bonds by the government instrumentality is not intended as and does not constitute an endorsement of the religious principles of the benefited religious institution or a repudiation of the religious tenets of any other religious institution.[252] Disclosure documents should make clear that the government's purpose is to provide tax-exempt status on bonds to further a valid public purpose, such as economic development, health care, or education, and not to provide direct government monetary assistance to the religious institution to further its religious objectives.[253] Loan agreements between the government issuer and the religious institution should explicitly

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to promote. Characterizing the government as speaker would require resolution of the issues raised with respect to government selection of beneficiaries discussed *supra* in Section III(B)(1)(d)(i).

252. The district court in *Steele* objected to the official statement for the bond issue, because it appeared to link the tenets of the religious school with the government instrumentality issuing the bonds. The court explained that, unlike the university in *Rosenberger,* a reasonable observer could assume that the governmental issuer in *Steele* was endorsing the religious views of the pervasively sectarian university. Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693, 734 (M.D. Tenn. 2000) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)), *rev'd*, 2002 FED App. 0274P (6th Cir.), 301 F.3d 401, *cert. denied*, 537 U.S. 1188 (2003).

253. In *Board of Education v. Mergens*, 496 U.S. 226 (1990), Justices Marshall and Brennan concurred in the judgment of the Court that a high school could not exclude a religious club from benefits the school provided to nonreligious extracurricular activities. They further asserted that "[the high school] must fully disassociate itself from the club's religious speech and avoid appearing to sponsor or endorse the club's goals." *Id.* at 270 (Marshall, J., concurring).

prohibit the religious institution from advertising or suggesting in any way that the issuance of tax-exempt bonds and approval of the issuance by an elected official constitutes sponsorship of the religious institution's religious tenets.

Thus, while current Supreme Court jurisprudence suggests that the members of the Court may validate tax-exempt bonds for religious institutions, governments and religious institutions must make clear to the reasonable observer that the government is not sponsoring the religious institution, providing direct financial support, or in any way actively involving itself in religious activity.[254] A government issuer must impose safeguards to prevent the fact and the appearance of active government support and sponsorship of a religious institution so that the issuance of tax-exempt bonds to finance projects for religious institutions will not violate the Establishment Clause.

254. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).