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It seems clear that any deliberate effort by government to impose religious orthodoxy will be held unconstitutional per se. A religiously motivated restriction on disfavored religious practices will be held to violate the Free Exercise Clause. Similarly, a religiously motivated attempt to promote or subsidize favored religious practices will be held to violate the Establishment Clause. These complimentary restrictions are now so ingrained in our political culture that the legislatures rarely transgress them.

The problem that has bedeviled the Supreme Court for many years is that government regulatory schemes and benefit programs designed to serve purely nonreligious objectives inevitably impact on religion inadvertently. In applying the Free Exercise Clause to cases of inadvertent interferenee, the Court adopted one fundamental doctrinal construct, promptly overruled that construct, adopted a nearly opposite principle, and then years later resurrected the original approach. In applying the Establishment Clause, the Court consistently articulated the same principle or "test" over many years, but produced a series of apparently inconsistent results. Most recently, the Court has consciously avoided articulating any standard or "test" in finding that a governmental action violates the Establishment Clause.

The task confronting the Court is to develop a coherent jurisprudence to deal with the frequent inadvertent collisions between governmental actions and the absolute prohibitions of the two religion clauses. Unfortunately, the Supreme Court appears unaware that this is precisely the same systemic jurisprudential question that is presented when similar regulations inadvertently affect the interests protected by the Free Speech Clause.

It is the central thesis of this Article that the conceptual methodology developed by the Court for dealing with inadvertence in the free speech context is the only sensible approach to the inadvertence problem in the context of any of the absolutely worded prohibitions of the First Amendment, including the two religion clauses. This Article concludes with an argument that those current threado in religion clause jurisprudence that appear to parallel the free speech methodology should be refined and reinforced while those that diverge from the free speech methodology should be abandoned.

A Coherent Methodology for First Amendment Speech and Religion Clause Cases

*Thomas R. McCoy**

I. THE SYSTEMIC PROBLEM OF "INADVERTENCE"

Along with the rest of the Bill of Rights, the two religion clauses of the First Amendment have been around for over 200 years. It seems incredible, but the Supreme Court has yet to develop a coherent and consistent approach to the application of these apparently simple clauses. In interpreting the Free Exercise Clause, the Court has adopted one fundamental doctrinal construct,[1] promptly overruled that construct, adopted a nearly opposite principle,[2] and then years later resurrected the original approach.[3] In applying the

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1. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

2. *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1942); *Sherbert v. Verner*, 374 U.S. 398 (1963).

3. See *Oregon v. Smith*, 494 U.S. 872 (1990) (holding that accidental governmental interferences with religion present no free exercise problem).

Establishment Clause, the Court has consistently articulated the same principle or "test" over many years.[4] In the application of the test to concrete cases, however, the Court has produced two lines of decisions. The Court has held that some governmental actions violate the Establishment Clause, while others do not, without articulating a principled or even discernible distinction between the constitutional actions and those held unconstitutional.[5] Most recently, the Court has consciously avoided articulating any standard or "test" in finding that a state action violates the Establishment Clause.[6]

In addition to its inability to assign coherent meaning to the two clauses separately, the Court has proved unable to read the two clauses together in a sensible way. The Court often has read one of the clauses to require some governmental action that prior cases suggest is flatly prohibited by the other clause.[7] The Court explains this ultimate bit of incoherence by asserting that there is a certain amount of tension between the policies underlying the two religion clauses, thus precluding the development of a completely consistent jurisprudence for the religion clauses.[8]

A casual reading of the two religion clauses of the First Amendment would not suggest such pervasive jurisprudential difficulties. Both clauses were intended to prevent governmental imposition of religious orthodoxy.[9] The Free Exercise Clause directly prohibits the government from using its regulatory powers to restrict individual practice of officially disfavored religions.[10] The Establishment

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4. For the original articulation of the test, see *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

5. See, for example, *Board of Education v. Allen*, 392 U.S. 236 (1968) (holding that the state may lend books to parochial school students); *Wolman v. Walter*, 433 U.S. 229 (1977) (holding that the state may not constitutionally lend maps, magazines, transparencies and other similar instructional materials to parochial school students); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (holding unconstitutional a system of tuition reimbursement and tax deductions for parents of parochial school students); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a similar system of tax deductions).

6. *Lee v. Weisman*, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467 (1992); *Board of Education of Kiryas Joel Village v. Grumet*, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994).

7. See, for example, *Sherbert*, 374 U.S. at 409-10 (holding that a state unemployment scheme violates free exercise in discrimination against the plaintiff due to her religious beliefs).

8. "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970).

9. The First Amendment, beginning with the words "Congress shall make no law . . .," limits only the power of Congress and not that of the states. The Supreme Court, however, has incorporated the First Amendment, including its religion clauses, into the Due Process Clause of the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion or prohibiting the free exercise thereof).

10. U.S. Const., Amend. 1.

Clause imposes a parallel prohibition on government, preventing the government from adopting, endorsing, funding, or otherwise promoting any "official" state religion.[11] While the Free Exercise Clause most directly articulates the common objective of the two clauses, the Establishment Clause specifically addresses a form of interference with religious liberty with which the Framers were most familiar and for which government historically had demonstrated a particular propensity.

The two religion clauses, then, are two sides of the same coin—a single constitutional restriction on the power of government to interfere with the religious liberty of its citizens. In substance, the religion clauses are simply a particularly important manifestation of the basic constitutional premise that the individual is to be left alone by government unless the government can show a sufficient reason to justify interfering with the individual's liberty. The religion clauses embody the express judgment that the religious preferences of the political majority do not constitute a sufficient reason for the use of governmental power to restrict the religious preferences of a political minority.

One would expect that any religiously motivated attempt by a legislative majority to restrict particular religious preferences would be invalidated by the Court as a per se violation of the Free Exercise Clause.[12] Similarly, one would expect that any attempt by a legislative majority to endorse or promote an officially approved religious belief or practice because of the legislature's religious preference for that belief or practice would be invalidated as a per se violation of the Establishment Clause.[13] Generally speaking, this proves to be the case when such issues reach the Supreme Court. Indeed, the notion of freedom of religion, as a particularly important subset of general individual liberty, is so engrained in our constitutional culture by now that such clear-cut cases rarely arise. It is extremely unlikely that a

11. Id. But see Justices Rehnquist's dissent in *Wallace v. Jafree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting), and Justice Scalia's dissent in *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting), which assert that the Establishment Clause merely prohibits the endorsement of an official state religion.

12. See *Church of Lukami Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (presenting the question of what to do with intentional governmental interferences with religion). Unfortunately, the various members of the Court couched even this apparently simple proposition in confusing terms. See note 100 for a more detailed discussion of the confusing rheteric in a number of the *Hialeah* opinions.

13. See *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidating a requirement that passages from the Bible be read or that the Lord's Prayer be recited in public schools at the beginning of each day, even though individual students could be excused upon written request from a parent).

state legislature or the federal Congress would prohibit individuals from maintaining a particular religious belief or acting on that belief simply because the legislative majority subscribes to a conflicting theological viewpoint.[14] For the same reason, it is extremely unlikely that Congress or any state legislature would be moved to adopt or endorse any particular formal religion as the official or established state religion.[15]

A form of classic or clear establishment clause case does arise somewhat more frequently than the classic free exercise case, however, because of numerous manifestations of "generic" religion in various formal government functions. Sessions of Congress and many state legislatures are opened with an "invocation" by a priest or minister, public school commencements and other similar solemn state occasions often include such an "invocation," our money carries the motto "In God We Trust," and even the congressionally mandated form of the "Pledge of Allegiance to the Flag" contains the phrase "under God."[16] It seems that consistent adherence to underlying establishment clause principles would require that these overt governmental endorsements of generic religion be invalidated as per se violations of the Establishment Clause. It is hard to see these governmental pronouncements as anything other than an official preference for one theological viewpoint (the existence of and potential for intervention by a god) over the contrary theological viewpoint (atheism).[17]

In spite of the obviously religious origins of these common conventions,[18] the Supreme Court has refused to excise them from

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14. But see *Hialeah*, which Justice Souter in concurrence characterizes as "a rare example of a law actually aimed at suppressing religious exercise." 113 S. Ct. at 2243 (Souter, J., concurring). Justice Blackmun's concurring opinion in *Hialeah* observes that: "[It] is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such." Id. at 2251 (Blackmun, J., concurring).

15. It is more likely that legislatures will attempt to promote generic religion over nonreligion. The recent resurgence of the school prayer movement seems to exemplify this inclination. See, for example, *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) (upholding a school district resolution that allowed students to deliver a nonsectarian, nonproseletyzing invocation since the prayer would serve the secular purpose of solemnizing the occasion). But see *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994) (holding that a prayer at a public high school violated the Establishment Clause).

16. H.R.J. Res. 243, 83d Cong., 2d Sess. (1954).

17. The government arguably has supported religion by recognizing Thanksgiving and Christmas as national holidays. One might justify this practice by claiming that these holidays have become secularized, minimizing their religious content. On the other hand, one might argue that the days are unavoidably religious, a kind of "cultural residue" of their religious origins.

18. See, for example, *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening its sessions with a prayer).

governmental activity. Since a refusal to invalidate these obvious governmental manifestations of religion cannot be satisfactorily reconciled with the express prohibition of the Establishment Clause by any course of reasoning or doctrinal development, these holdings generally are viewed as exceptions to the establishment clause requirements. The exceptions often are characterized as covering "de minimis" instances of government endorsement or as historic governmental practices that have largely lost their religious significance or at least have proven not to lead the government into further involvement with religion.[19] However one characterizes the exceptions for doctrinal purposes, it seems clear that the Court has chosen to ignore or overlook certain well-established, and in the Court's view harmless, violations of the basic establishment clause principle. When these historic or de minimis practices are set to one side, religiously motivated governmental endorsement of religion is almost as rare as religiously motivated governmental restrictions on religious liberty. Thus, with the exception of the de minimis or historic cases, classic establishment clause cases are as unlikely in our current political culture as are classic free exercise cases.

At this level, it is fair to say that the religion clauses impose an absolute prohibition against legislative attempts to aid or restrict

19. In *Marsh*, for example, the Court refused to invalidate Nebraska's practice of opening sessions of its legislature with a prayer. Id. at 792-95. The opinion noted that Congress had opened its sessions with prayers for almost two hundred years and that courts, including the Supreme Court itself, open with the statement, "God save the United States and this Honorable Court." Id. at 786-88. The Court opined that long history supported these practices: "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought the Clause applied to the practice authorized by the First Congress—their actions reveal their intent." Id. at 790. In her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor approved of the practices of declaring Thanksgiving a national holiday, printing "In God We Trust" on coins, and opening court sessions with the words, "God save the United States and this Honorable Court." According to Justice O'Connor, "[t]hose government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." Id. at 693.

Concurring in the same case, Justice Brennan defended the designation of "In God We Trust" as our national motto and references to God in the Pledge of Allegiance as forms of "ceremonial deism," which, through rote repetition, had lost any significant religious content. Id. at 716. "Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." Id. at 717.

religion and that by-and-large (again setting aside the de minimis exceptions) the legislatures are conditioned to respect the prohibition. The Supreme Court seems more than ready to enforce the prohibition against the occasional legislative foray into the area of religious preference.[20] Invoking the imagery popularized by Thomas Jefferson, our political system is characterized by a "wall of separation between church and state."[21]

If this all seems so clear, so elementary, what is the problem that has bedeviled the Supreme Court throughout the history of religion clause litigation? If, indeed, the underlying value of freedom of religion is so engrained in our political culture that the legislatures rarely transgress, how has the Court made such a mess of religion clause jurisprudence? The problem, quite simply, is that governmental regulatory schemes and benefit programs designed to serve purely nonreligious governmental objectives inevitably impact on religion accidentally or inadvertently. As government becomes a larger and more pervasive factor in our daily lives, inadvertent collisions between purely secular governmental actions and religion clause values become increasingly frequent.[22]

In an earlier era characterized by little governmental regulation of individual conduct, it was less likely that one of those governmental regulations would restrict individual conduct that happened to result from an individual's religious beliefs. But with today's far more pervasive governmental regulation of individual conduct, it is inevitable that some of those regulations will reach conduct that for some individuals is religiously motivated. For example, the National Labor Relations Act ("NLRA") was passed by Congress to readjust the relative economic power of labor and management in contract negotiations.[23] Nothing in the purpose or legislative history of the NLRA gives the slightest suggestion that it was intended to restrict or impede any religious belief or conduct because of a religious preference

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20. See *Hialeah*, 113 S. Ct. at 2217 (all nine Justices found ordinances prohibiting ritual slaughter of animals to be unconstitutional).

21. 8 Jeff. Works 113.

22. "As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay." *McGowan v. Maryland*, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., concurring).

23. See Linda L. Rippey, *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 Vand. L. Rev. 627, 628-29 (1988) (providing an overview of the NLRA).

of the legislature. Thus, there is no clear free exercise problem and our "wall" of separation between church and state is not directly threatened by the NLRA. In most of its applications the NLRA has no impact at all on religious beliefs or practices. But if the NLRA is applied to the relationship between teachers and administrators at parochial schools, still in pursuit of the purely economic goals of the NLRA, the result is a very serious infringement on the liberty of those parochial schools to pursue their mission of religious education.[24]

What should the Free Exercise Clause be read to say about such accidental or inadvertent interferences with religious liberty? Should the Free Exercise Clause be read to impose the same absolute ban on inadvertent governmental interferences that it imposes on deliberate governmental interferences? Should the government be barred by the Free Exercise Clause from applying universal vaccination laws,[25] compulsory education laws,[26] drug and alcohol abuse laws,[27] tax laws,[28] etc., where the individual refusal to comply happens to be religiously motivated? The "wall of separation" imagery would seem to suggest that religiously motivated individual conduct is constitutionally exempt from the application of universal health and welfare regulations and tax laws. Such a notion, however, would quickly produce regulatory chaos in view of both the increasing religious diversity of our population and the increasingly pervasive and detailed reach of general health and welfare regulations and tax laws. Do we therefore conclude that, as long as the government has not set out to regulate religion for religious reasons, a regulation raises no free exercise clause problem? Is this the case no matter how serious the inadvertent interference with an individual's religion and no matter how insignificant the government's nonreligious regulatory objective?

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24. See, for example, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that church operated schools were not within the jurisdiction of the NLRB because of the religion clauses of the First Amendment); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding religious institutions' statutory exemption from laws against religious discrimination in employment); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (dealing with a church's objection to paying minimum wages because of the cost of regulation).

25. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning the constitutionality of compulsory vaccination laws as applied to religious objectors).

26. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (concerning the constitutionality of mandatory education laws as applied to the Old Order Amish).

27. See *Smith*, 494 U.S. at 872 (concerning the constitutionality of a state law prohibiting the use of peyote as applied to Native Americans).

28. See *United States v. Lee*, 455 U.S. 252 (1982) (concerning the constitutionality of the federal social security tax as applied to the Amish).

Similar problems arise when a governmental benefit scheme designed to promote a purely secular objective such as universal education or universal health care accidentally or inadvertently aids an individual or institution engaged in religiously motivated conduct. Making municipal fire and police protection or sewer and water services available to a church or parochial school is real economic assistance to religion because the religious institution would otherwise be forced to provide those services for itself at greatly increased cost. Grants available to individuals under education or job training programs will be spent by some recipients at seminaries or other religious schools to pursue religious careers.[29] Certainly in those instances the government grant program has significantly, though unintentionally or inadvertently, aided religion.

In our modern welfare state characterized by government-provided health care, education, job training, transportation, and minimum family incomes, inadvertent assistance to religious institutions or individuals engaged in religiously motivated conduct is inevitable.[30] What should the Establishment Clause be read to say about such inadvertent or accidental governmental aid of religion? In fidelity to the "wall of separation" imagery, should we hold that all governmental benefit schemes are unconstitutional whenever they accidentally result in assisting religious institutions or religiously motivated individuals? The impracticality, not to mention the undesirability, of such an approach must be obvious. Do we therefore conclude that, as long as the government is pursuing some nonreligious objective, aid to religion that results from a governmental benefit scheme raises no establishment clause problem? Is this true no matter how great and no matter how conspicuous the aid to religion and no matter how much it creates the (unintended) impression of close association between government and religion?

Simply stated, the problem that continues to vex the Court is what to do about inadvertent or accidental impacts on religion when they are challenged under the religion clauses. What should the Free Exercise Clause be read to mean with respect to inadvertent governmental interferences with religion and what should the Establishment Clause be read to mean with respect to instances of

29. See *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (allowing a student to use a vocational rehabilitation grant at a Christian college for seminar training).

30. See, for example, *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (allowing a student to use a state-provided sign-language interpreter in a religious school).

inadvertent governmental aid to or endorsement of religion? The task confronting the Court, a task to which it seems perennially unequal, is to develop a coherent jurisprudence to deal with the frequent inadvertent collisions between governmental actions and the absolute prohibitions of the First Amendment religion clauses.

All of the absolutely worded prohibitions of the First Amendment present essentially the same systemic question: How should the Court deal with an inadvertent or accidental governmental interference with the protected right? For example, the Court is regularly confronted with free speech clause challenges to governmental regulations intended to reduce noise or litter, to preserve public safety, or to enhance environmental quality. These challenges are brought by individuals whose chosen form of expression (loudspeakers, leaflets, picketing, billboards, etc.) would violate the regulation in question, even though the regulation was in no way intended to suppress the speaker's message and reflects no legislative hostility to the message or legislative preference for a competing point of view. Any deliberate attempt by the government to censor or impede political speech because of hostility to the message would be found to be a per se violation of the Free Speech Clause. But what are we to do with general health, welfare, and safety regulations that inadvertently impede a particular individual's ability to disseminate his or her political message?

A close examination of the Court's cases involving inadvertent interference with speech reveals that the Court has made considerable progress in developing a workable jurisprudential approach to inadvertence in the free speech context. Unfortunately, the Supreme Court appears unaware that this is precisely the same systemic jurisprudential question that is presented when similar regulations inadvertently affect the interests protected by the religion clauses.[31] The

31. One member of the Court, Justice Scalia, is well aware that inadvertent governmental interference with the free exercise of religion presents precisely the same jurisprudential problem that is presented by inadvertent governmental interference with free speech. Justice Scalia persuaded a majority of the Court in *Smith*, 494 U.S. at 872, that inadvertent interferences with religion should be held to raise no First Amendment problem and that the line of cases beginning with *Sherbert*, 374 U.S. at 398, should therefore be overruled. He then argued in his concurring opinion in *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560, 579 (1991) (Scalia, J., concurring), that the Court should adopt the same hands-off approach to inadvertent intorferences with speech and that the line of cases typified by *United States v. O'Brien*, 391 U.S. 367 (1968), should be overruled.

In contrast, the central thesis of this Article is that the existing free speech methodology typified by *O'Brien* and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), should be incorporated into the Court's free exercise of religion jurisprudence, thus displacing Justice Scalia's hands-off approach in *Smith*.

Court persists in approaching cases of inadvertent interference with speech through one set of doctrinal formulations, cases of inadvertent interference with religion through an apparently unrelated set of doctrinal formulae, and cases of inadvertent aid or endorsement of religion through yet a third set of apparently independent doctrinal constructs.

It is the central thesis of this Article that the conceptual methodology developed by the Court for dealing with inadvertence in the free speech context is the *only* sensible approach to the inadvertence problem in the context of any of the absolutely worded prohibitions of the First Amendment. More specifically, this Article argues that the Court's doctrinal approach to inadvertence in the free speech context embodies the only workable conceptual methodology for the structurally identical problems of inadvertence in the free exercise context and in the establishment clause context.

The second Part of this Article studies in some detail the Court's unsatisfactory attempts to develop a workable jurisprudence for religion clause challenges to governmental actions that accidentally or inadvertently affect religion. The third Part examines the doctrinal methodology employed by the Court to deal with cases of inadvertent interferences with speech. The fourth Part explores the application of the Court's free speech methodology to the problems of inadvertence in the free exercise clause context and in the establishment clause context. The Article concludes with the argument that those current threads in religion clause jurisprudence that appear to parallel the free speech methodology should be refined and reinforced while those that diverge should be abandoned. Surprisingly, this approach suggests among other things that the *Lemon* test in establishment clause cases is not the complete "lemon" that it is commonly thought to be!

II. "INADVERTENCE" IN RELIGION CLAUSE JURISPRUDENCE

A. The Free Exercise Clause

The Court's earliest attempts to cope with the problem that this Article has characterized as inadvertent or accidental regulatory interference with an individual's religion took the form of the now

discredited belief-action distinction.[32] According to this simple doctrinal construct, the state was absolutely prohibited by the Free Exercise Clause from regulating individual religious beliefs, but the clause placed no special restriction on the ability of the state to regulate religiously motivated conduct.

As a first cut at the problem, the belief-action distinction was not as mindless as it now is commonly thought to have been. In fact, it was a rough approximation of, or a workable surrogate for, the distinction between deliberate legislative interference with religion for religious reasons and accidental or inadvertent interferences with religion in pursuit of some nonreligious legislative objective. Any legislative measure designed to prohibit a particular religious belief unaccompanied by any conduct would most certainly be motivated only by the preference of the legislature for a competing religious belief. Thus, all cases of regulation of belief would be regulation of religion for religious reasons and would be per se violations of the Free Exercise Clause. On the other hand, most state regulations of conduct are for public welfare purposes having nothing to do with the legislature's religious preferences. Any interference with religion that results from the usual state regulation of conduct arises only when particular individuals are engaging in the generally regulated conduct because of their particular religious beliefs. Thus, interferences with religion that result from generally applicable regulations of conduct are usually inadvertent.

The primitive or rudimentary belief-action doctrinal construct proved unsatisfactory in two respects. First, the correlation between the belief-action distinction and the deliberate-inadvertent distinction was far from perfect. It is apparent that the legislature could regulate religious conduct, such as worship services, for no reason other than the legislature's religious preference in the choice of acceptable conduct. Second, a regulation of religiously dictated conduct would be upheld no matter how central the conduct was to the exercise of religion and no matter how insignificant was the government's nonreligious regulatory interest. Thus, the Court was forced to abandon the simplistic belief-action distinction in favor of something approximating the distinction between deliberate state interference with religion for religious reasons and inadvertent interference with religion in pursuit of some nonreligious state objective.[33]

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32. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

33. See *Gobitis*, 310 U.S. at 594-95 (providing a replacement for the belief-action distinction).

The Court, however, carried forward to the new deliberate-inadvertent distinction the second shortcoming of the old belief-action distinction. According to the belief-action doctrine, once the Court found the regulation to address action rather than belief, the Free Exercise Clause presented no further problem.[34] Not surprisingly, when the Court substituted an intuitive form of the deliberate-inadvertent distinction for the cruder belief-action distinction, the Court continued to hold that the Free Exercise Clause presented no problem once the interference with religion was found to be inadvertent.[35] Thus, at this point in the development of free exercise clause jurisprudence, a deliberate state interference with religion for religious reasons was per se unconstitutional. An inadvertent state interference with religion in pursuit of nonreligious state objectives raised no free exercise clause problem, however, no matter how serious the interference, no matter how trivial the state's nonreligious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion.

Shortly after Justice Frankfurter announced this rule for the Court in *Gobitis*,[36] the Court seemed to recognize the extent to which its approach subordinated the religious liberty of political minorities, a specially protected constitutional value, to the common everyday economic and public welfare objectives of the legislative majority. Within three years, the Court in *Board of Education v. Barnette*[37] overruled the simple but constitutionally insensitive doctrine of *Gobitis* and suggested instead that even inadvertent legislative interferences with religion must pass some constitutional scrutiny under the Free Exercise Clause.[38] This suggestion ultimately grew to full flower in the 1960s and '70s in cases like *Sherbert*[39] and *Yoder*.[40] That line of cases held that a generally applicable regulatory measure will violate the Free Exercise Clause, as applied to individuals whose regulated conduct happens to be religiously motivated, unless the state can show a compelling governmental interest to justify the accidental interference with religion. In other words, in a relatively

34. *Reynolds*, 98 U.S. at 166.

35. According to Justice Frankfurter in *Gobitis*: "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." 310 U.S. at 594-95.

36. Id.

37. 319 U.S. 624 (1943).

38. Id. at 642.

39. 374 U.S. at 398.

40. 406 U.S. at 205.

short period of twenty-three years from *Gobitis* to *Sherbert*, the Court moved from the doctrine that inadvertent interferences with religion raise no free exercise problem to the doctrine that such interferences violate the Free Exercise Clause in the absence of a compelling state interest—the highest level of constitutional scrutiny short of a holding of a per se violation.

The *Sherbert* compelling interest doctrine certainly solved the major remaining problem with *Gobitis* and its predecessor, the belief-action distinction. No longer could an individual's fundamental religious exercises be interfered with by an insensitive legislature in pursuit of some trivial nonreligious objective, or in the face of alternative regulatory approaches that would not have produced such a serious impact on religion. If a regulation impacted an individual's religion, the regulation could only be constitutionally applied to that individual if the Court found that the legislature was pursuing a compelling nonreligious governmental objective and that the legislature had chosen the least intrusive means possible to pursue that objective.

Unfortunately, the *Sherbert* doctrine invited any adherent of any unusual religion to demand constitutional exemption from any generally applicable public welfare regulation when the individual's desire to engage in the regulated activity happened to be religiously motivated. In short order, the Court was confronted with claims that: a prohibition against racial discrimination violated the Free Exercise Clause when applied to discriminatory policies of a religious college that were religiously motivated;[41] a government decision to build a road in a government-owned wilderness area was precluded by the Free Exercise Clause because practitioners of a certain Native American religion considered the area sacred;[42] and a requirement that counsellors in a state-operated drug counseling program refrain from personal use of hallucinogenic drugs violated the Free Exercise Clause if the personal drug use by the counsellors was religiously motivated.[43]

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41. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

42. See *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1988).

43. See *Smith*, 494 U.S. at 872. Both *Smith* and *Sherbert*, 374 U.S. at 398, actually involved state unemployment compensation schemes that denied benefits to individuals who were unemployed because they refused to qualify for available jobs. In each case, the claimant's refusal to qualify for the job was based on religious reasons. The Court in both cases invoked a form of the "unconstitutional conditions" doctrine to find that the withholding of unemployment benefits actod as a "penalty" on each claimant's exercise of religious choice. The Court then applied the free exercise analysis that would be applicable to any accidental regulatory interference with religion.

The problem with the *Sherbert* approach was that the Court seemed to have substituted one extreme, the highest and strictest form of constitutional review, for the earlier extreme of *Gobitis*, which found no constitutional problem at all in cases of inadvertent state interference with religion. Under *Sherbert*, if the compelling interest test were taken seriously, generally applicable health and welfare regulations would be held unconstitutional as applied. This would be the case whenever such regulations impacted religion, no matter how sound the state interest (short of *compelling*), no matter how insignificant the impact on religion, no matter how peripheral the impacted practice was to the particular religion, and regardless of whether alternative practices were available to the individual that would serve his or her religious purposes almost as well as the regulated practice.

Naturally the Court was loath to dismantle its newly found and entirely appropriate sensitivity to religious values inadvertently trod upon by the state. But the Court was equally loath to paralyze the regulatory machinery of the state by creating a dizzying array of religious exceptions to otherwise generally applicable regulations. The Court's initial response to this problem with *Sherbert* was to continue applying something like the compelling interest test to each case as a matter of theory or rhetoric, while effectively reducing the level of scrutiny actually applied in cases where the impairment of religion seemed less serious.[44]

For other examples of unusual free exercise challenges to generally applicable regulations, see *Fromer v. Scully*, 817 F.2d 227 (2d Cir. 1987) (involving a religious objection to a prison directive that required Orthodox Jewish inmates to shave their beards to a length of one inch); *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982) (involving a conflict between the Orthodox Jewish requirement of yarmulke and a state ban on headgear for basketball players); *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987) (involving a religious objection to a social security number requirement for driver's licenses).

44. In *Yoder*, 406 U.S. at 205, the Court conspicuously avoided using the words "compelling interest" from *Sherbert*. Instead, the majority in *Yoder* employed language such as "a state interest of sufficient magnitude to override," "only those interests of the highest order and those not otherwise served," "unduly burdens the free exercise of religion," "somewhat less substantial," and "incumbent on state to show with more particularity." Id. at 214, 220, 228, 236. In later cases, the Court found that "heightened scrutiny" was met by the government's interest in tax revenue even though it is axiomatic that financial concerns never rise to the level of a "compelling interest." Similarly, in *Bob Jones University*, 461 U.S. at 574, the Court casually asserted that the government had shown a compelling interest in suppressing a private religious college's policy prohibiting interracial dating.

Professor Berg has observed that: "*Sherbert v. Verner* can be read in a 'moderate' fashion, as instituting case-by-case 'close scrutiny,'" instead of a true compelling interest test. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 28 (1994). Professor Berg observed that the Burger and Rehnquist Courts had begun to differentiate between types of burdens on religion, which could

Later the Court expressly rejected the notion that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification."[45] Unfortunately, the Court did not go on to articulate clearly an alternative standard or methodology for assessing the governmental action that "incidentally" impaired the free exercise of religion. In its most recent encounter with the problem, the Court seems to have tossed out the entire *Sherbert* line of development and expressly reinstated the simplistic approach of *Gobitis*. This startling development occurred in an opinion for the Court by Justice Scalia in *Smith*, the "peyote case."[46]

In his opinion in *Smith*, Justice Scalia argued forcefully that it would unacceptably impede the complex business of government if the Court were to apply conscientiously the rigorous compelling interest standard to every case in which a generally applicable state regulation inadvertently interfered in some minor way with an individual's religion.[47] Of course, the Court had previously acknowledged as much by watering down the compelling interest test in selected cases where the Court was unimpressed with the seriousness of the unintentional impact on religion.[48] But Justice Scalia rejected this sort of ad hoc manipulation of the compelling interest test on the grounds that it destroyed the force of that formidable constitutional standard in those cases such as race discrimination where an extremely high level of constitutional scrutiny was demanded.[49]

At this point, Justice Scalia might have opted for the articulation of some mid-level of scrutiny, some relativistic weighing of the importance of the religion claim against the importance of the state interest being served by the regulation. This too he rejected, however, because he viewed assessing the importance of a particular religious practice to be an impossible judicial task.[50] Thus, Justice Scalia concluded that the Court had no option but to return to the

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"reflect a justifiable effort to weigh the strength of the religious interest, . . . as part of the overall process of 'balancing.' It seems sensible to require stronger reasons to justify a severe effect on religious freedom, and less to justify a minor effect." Id. at 51. Professor Berg ultimately concluded, however, that courts are not competent to weigh effects on religion.

45. *Lyng*, 485 U.S. at 450.
46. 494 U.S. at 872.
47. Id. at 888-89.
48. See cases cited in note 44.
49. 494 U.S. at 888.
50. Id. at 886-87.

Gobitis doctrine that inadvertent state interferences with religion raise no free exercise clause problem no matter how serious the inadvertent interference and no matter how trivial the state's nonreligious regulatory objective.[51]

The *Gobitis* position to which the Court returned after fifty years in *Smith* is highly unsatisfactory in several respects. First, the religion clauses of the First Amendment were intended to protect minority religions and minority religious practices from the tyranny of the religious and political majority.[52] A deliberate regulatory interference with minority religious freedom by the majority for religious reasons is certainly the worst form of religious tyranny by the majority. Regulatory interference with a minority religion as a result of the ignorance or insensitivity of the religious and political majority is, however, no less an interference with the minority's religious freedom.[53] One can be confident that if the regulation in question had restricted the majority's religious practices, the majoritarian legislative process would have modified or rejected the regulation. Thus, the imposition of the political majority's nonreligious objectives at the expense of the minority's religious interests implements the majority's religious viewpoint at the expense of the minority's.

The second problem with the resurrected *Gobitis* approach is that, in our political culture where direct deliberate regulatory imposition of religious orthodoxy is nearly unthinkable, state impairments of minority religious practice will be of the inadvertent kind.[54] To say that the Free Exercise Clause provides no protection at all from such impositions on religious freedom is to read the Free Exercise Clause as essentially meaningless surplusage in the contemporary context.

The third and most damning problem with the *Gobitis* position is that it simply defies educated common sense. Even a reasonably sophisticated person surveyed on the street probably would conclude with little hesitation that the Free Exercise Clause should not be read to allow the state to interfere with the most deeply held fundamental

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51. Id. at 878-79.

52. "The [Free Exercise] Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both." *Hialeah*, 113 S. Ct. at 2248 (Souter, J., concurring).

53. "[L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Smith*, 494 U.S. at 901 (O'Connor, J., dissenting). "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220. See also *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (quoting *Yoder*).

54. *Hialeah*, 113 S. Ct. at 2243 (Souter, J., concurring).

religious convictions of an individual in order to pursue some trivial state economic or bureaucratic objective.[55] This is particularly true where alternative approaches were available to the state that would have been equally effective in pursuit of the state's objective without the serious inadvertent impact on religion.[56]

B. The Establishment Clause

The Supreme Court, at least until very recently, has approached cases of inadvertent governmental aid to, or endorsement of, religion with what is commonly called the *Lemon* test. Although the test is named after the case in which it was articulated,[57] the name often is thought to suggest a comment on the quality of the jurisprudence involved. According to the *Lemon* test a court confronting an establishment clause problem should ask three questions:

> (1) Is it the purpose of the governmental action to aid or promote religion?

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55. "There appears to he a strong argument . . . that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatoned . . . the serious needs of the State." Id. at 2249.

56. With the Religious Freedom Restoration Act ("RFRA"), Publ. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C.A. § 2000bb (West 1994)), Congress explicitly disapproved of the *Smith* holding that accidental interferences do not pose free exercise problems. The Act declares that whenever governmental action "substantially burden[s]" the "exercise of religion," the government must prove that applying a law to a religious objector is the "least restrictive means of furthering" a "compelling governmental interest." RFRA § 3(b). Thus, the RFRA simply reimposes the "compelling interest" rhetoric which already has proved almost uselessly plastic in Supreme Court decisions subsequent to *Sherbert* and *Yoder*. See note 44.

The RFRA's findings refer to the test "as set forth in prior Federal court rulings." RFRA § 2(a)(5). Furthermore, Congress stated that the purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened." Id. at § 2(b)(1). The legislative history reveals that Congress believed that "the compelling interest test generally should not be construed more stringently or leniently than it was prior to *Smith*." S. Rep. No. 103-11, 103d Cong., 1st Sess. 9 (1993). Accord H. Rep. No. 103-88, 103d Cong., 1st Sess. 7 (1993). See generally Berg, 39 Vill. L. Rev. at 17-18, 26-28 (cited in note 44).

If Congress has imposed the "compelling interest" test actually implemented in the line of cases from *Sherbert* and *Yoder* through the 1993 passage of the RFRA, and if that version of the compelling interest test actually amounts to a *Clark* methodology as this Article argues, then in fact one should understand the RFRA to impose that methodology. This interpretation seems unavoidable because the Supreme Court will not read the RFRA to protect religiously motivated conduct where it would not have been protected pre-*Oregon v. Smith*—i.e., the regulation pursued some very important nonreligious objective, there were no adequate regulatory alternatives available to the government that would not entail as much inadvertent impact on religion, and the inadvertent impact on religion was fairly minimal.

57. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

(2) Even if it is not the purpose of the action, is aid to or promotion of religion the primary effect of the governmental action?

(3) Does the governmental action result in excessive entanglement with religion?

If the answer to any of these three questions is affirmative, the governmental action in question will be held to violate the Establishment Clause.[58]

Close inspection reveals that this apparently simple three-part test actually combines two different kinds of questions and fails to provide any real guidance on how to articulate, much less answer, the critical question in a case of inadvertent establishment of religion. The first of the three questions does not embody a methodology for dealing with inadvertence cases at all. It poses the threshold inquiry of whether the aid is in fact inadvertent or is deliberate and thus per se unconstitutional as a classic violation of the Establishment Clause. In effect, the first of the three *Lemon* questions does nothing more than restate what we knew all along: if the government aid to religion is deliberate, it is per se unconstitutional; if it is not deliberate, we have a tricky constitutional problem. Stated another way, the first of the three *Lemon* questions simply requires that we distinguish between deliberate aid to religion cases (which are rare and per se unconstitutional) and inadvertent or accidental aid cases. The first question tells us nothing at all about what to do if we have an unintentional or inadvertent aid case. Thus, the methodology offered by the *Lemon* test for inadvertence cases is contained entirely in the second and third questions.

The second *Lemon* question requires that we ask whether the unintended effect of aiding religion is the "primary" effect of the governmental action. Since by definition the first question has precluded the possibility of an *intended* effect to aid religion, it is not immediately clear what the term "primary" effect means in the second question. The only plausible meaning in this context must be some notion of the amount, importance, or obviousness of the aid. After the first question has weeded out all intentional aid cases, the second question must be understood to ask whether the unintended effect of aiding religion is too great, too significant, or too conspicuous to be constitutionally tolerable, even though it was not intended.

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58. Id. at 612-13.

Although as an initial matter this is probably the right question to ask in an unintentional aid or endorsement case, the formulation is so general that it gives a court almost no guidance at all on how to go about answering the critical question. How much inadvertent aid is too much? Too much compared to what? Should the Court consider alternative approaches available to the state that would have allowed the state to pursue its nonreligious objectives with less accidental endorsement of religion? Should the state be required to pursue an alternative approach that does not involve as much inadvertent endorsement of religion where the alternative approach does not serve the state's nonreligious objective quite as well? How much reduction in the effectiveness of the state's nonreligious program is required in order to avoid how much inadvertent aid to religion? While the second question of the three-part *Lemon* test may pose the correct inquiry at the most general level, it hardly even hints at the sophisticated judgments required to implement the Establishment Clause in a case of inadvertent governmental aid to religion.

The third question of the three-part *Lemon* test is whether the inadvertent aid (first question) which is not too much or too significant (second question) results in excessive governmental entanglement with religion. Its application in numerous dissimilar cases[59] suggests that the "entanglement" notion in the religion clause context serves as some sort of comprehensive catch-all for various constitutionally suspect elements that do not fall neatly into the categories of aid or regulation. As it appears in the third *Lemon* question, it seems that the vague notion of entanglement refers to some sort of implicit governmental endorsement of religion resulting from the appearance of close association between government agencies or officers on the one hand and the officers or agencies of religion on the other hand. In effect, the Court's concern about "entanglement" in an establishment clause context, as opposed to a regulatory or free exercise context,[60] must be some sort of concern about government appearing to legitimate or endorse religion by working too closely in a kind of conspicuous partnership with religion, even though under the second *Lemon* question it was found that the inadvertent aid actually given religion was not significant.

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59. See, for example, *Aguilar v. Felton*, 473 U.S. 402, 409 (1985) (noting that supervising the content of publicly funded classes in religious schools "inevitably results in the excessive entanglement of church and state").

60. For an example of the use of "entanglement" in a free exercise context, see *Catholic Bishop of Chicago*, 440 U.S. at 502 (declining to apply the NLRA to labor relations in a parochial school context because such an application would present problems of entanglement).

Thus, one usefully can view the third *Lemon* inquiry as simply addressing a particular subcategory of aid to religion, i.e., *apparent endorsement*. The third question, which directs the Court to determine whether the entanglement is excessive, can then be seen as asking about this particular subcategory of inadvertent aid the same question that is posed by the second inquiry regarding all other inadvertent aid, i.e., is it too much? In effect, the second and third *Lemon* questions collapse into a single inquiry: Is the inadvertent governmental aid, whether real (second *Lemon* question) or apparent (third *Lemon* question), too much to tolerate under the Establishment Clause? The separate articulation of the third *Lemon* question, which turns out to be simply a particularized application of the second question, adds nothing to guide the Court in making the complex value judgments that are required by the second *Lemon* question.

Although there have been some recent rumblings of dissatisfaction with the *Lemon* test from individual justices,[61] the Court has failed to develop the *Lemon* test beyond a three-part construct that sounds misleadingly specific but in fact reduces to a single extremely general question of degree. This specific-sounding, but in fact extremely general, instruction to the Court to make an ad hoc value judgment about how much inadvertent aid to religion is too much in

61. Justice Scalia recommended abandoning the *Lemon* test because it has made "such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held constitutional." *Aguillard*, 482 U.S. at 636 (Scalia, J., dissenting). According to Justice Scalia, the *Lemon* test exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the First Amendment, and is too flexible and unprincipled a standard to be tolerated. Id. at 640. He wrote that the "flexibility" of the *Lemon* test should be sacrificed for "clarity and predictability" in the Establishment Clause area. Id.

In his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2149-50, 124 L. Ed. 2d 352 (1993), Justice Scalia derided the *Lemon* test still more graphically. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Id. Also concurring in *Lamb's Chapel*, Justice Kennedy referred to the majority's citation of *Lemon* as "unsettling and unnecessary." Id. at 2149 (Kennedy, J., concurring).

Justice Rehnquist rejects the *Lemon* methodology because of the confusion in its applications and because of his interpretation of the Framers' intent. *Wallace*, 472 U.S. at 110-11 (Rehnquist, C.J., dissenting). According to Justice Rehnquist, the Framers intended the Establishment Clause merely "to prohibit the designation of any church as a 'national one' " and "to stop the [government] from asserting a preference for one religious denomination or sect over others." Id. at 113.

Attacking the *Lemon* test from the opposite flank, Justice Stevens has stated that "[r]ather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment." *Committee for Public Education v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

each case has produced, not surprisingly, wildly varying results over time. For example, the Court has held that the state may lend books to parochial school students,[62] but in another case held unconstitutional the lending of maps, magazines, transparencies and other similar instructional materials.[63] Likewise, the Court has held unconstitutional a system of tuition reimbursements and tax deductions for parents of parochial school students,[64] yet in a later case upheld a similar system of tax deductions.[65]

The *Lemon* test in effect (though not in its articulation) asks the right question: How much inadvertent governmental aid to or endorsement of religion is too much? But the formulation of the issue is so imprecise, so primitive and confusing, that no guidance is provided on what the Court should look at and what sort of yardstick it should use to measure the elements that are considered relevant. The question as formulated does not even tell us whether the Court should consider the availability of alternative governmental approaches to the program, where those alternatives would entail less inadvertent aid to religion. The Court in *Lemon* remains a long way from a coherent jurisprudence for cases of inadvertent governmental aid to or endorsement of religion. This Article concludes that the appropriate response to the current dissatisfaction with *Lemon* is the further development and refinement of the *Lemon* approach rather than the complete rejection of the *Lemon* methodology.

III. "INADVERTENCE" IN THE FREE SPEECH CONTEXT—THE *CLARK* METHODOLOGY

The Supreme Court continues to struggle with the vagueness of the *Lemon* test in establishment clause cases and with the all-or-nothing dilemma of the *Sherbert* approach versus the *Gobitis-Smith* approach in free exercise clause cases. Meanwhile, however, the Court has developed a much more coherent and sophisticated doctrinal framework to address the problem of inadvertent interference with free speech.

The Supreme Court's earliest encounters with the problem of inadvertent regulation of speech came in the form of so-called "time,

62. *Allen*, 392 U.S. at 236.
63. *Walter*, 433 U.S. at 229.
64. *Nyquist*, 413 U.S. at 756.
65. *Mueller*, 463 U.S. at 388.

place, or manner" restrictions on traditional forms of speech.[66] Classic examples are regulations restricting the sound volume or the hours of use of truck-mounted loud speakers,[67] regulations restricting the size or placement of signs or billboards,[68] and regulations prohibiting the obstruction of pedestrian or vehicular traffic by picketers or speechmakers.[69] These general health, welfare, and safety regulations were explicitly directed at activities commonly perceived as communication, i.e., "speech." Nonetheless, the Court understood that in many cases the regulatory objective (e.g., reduced noise, clutter, or congestion) was entirely legitimate from a First Amendment perspective. The legislature was not seeking to make communication more difficult or to promote or retard any particular viewpoint in the marketplace of ideas.

Inadvertent regulation of speech presented a serious dilemma. On the one hand, such general health, welfare, and safety regulations are not on their face the sort of censorship of ideas or messages that the First Amendment seems designed to preclude. The traditional police powers of government could be rendered largely impotent if every violator of a general rule could claim exemption from regulation on the grounds that his prohibited conduct was in some way communicative, or was (in the language of today) intended to "make a statement!" On the other hand, however, effective censorship of the message can be achieved by invoking apparently neutral health, welfare, and safety regulations that prohibit the use of the only medium available to the speaker. Even if no deliberate attempt to suppress the message by restricting the medium is apparent, the health, welfare, and safety objective of the state might be so trivial or so poorly served by the regulation that the serious (though inadvertent) restriction on speech is unwarranted.

In response to this difficult analytical and constitutional policy problem, the Court developed a sophisticated and discriminating body of free speech jurisprudence. Legitimate "time, place, or manner" restrictions on traditional forms of speech were, according to the Court, distinguishable from those regulations that expressly or cov-

66. See, for example, *Kovacs v. Cooper*, 336 U.S. 77 (1949) (concerning the constitutionality of a New Jersey law prohibiting sound trucks); *Schneider v. State*, 308 U.S. 147 (1939) (concerning the constitutionality of municipal laws prohibiting distribution of leaflets).

67. *Kovacs*, 336 U.S. at 78-79.

68. *Metromedia v. San Diego*, 453 U.S. 490 (1981); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

69. *Cox v. Louisiana*, 379 U.S. 536 (1965) (upholding a statute that prohibited unlicensed parades or processions upon public streets so that public authorities could prepare to police the event, avoid overlapping events, and secure use of the streets for others).

erly censored or impeded speech because of official disapproval of the message.[70] Time, place, or manner restrictions will be sustained in the face of a First Amendment challenge if (1) they are justified without reference to the content of the regulated expression, (2) they are narrowly tailored to serve a significant governmental interest, and (3) they leave open adequate alternative channels for communication of the information or viewpoint.[71]

After it had come to grips with the problem of "time, place, or manner restrictions" on traditional forms of speech, the Court began to confront First Amendment challenges to regulations that prohibited forms of conduct not readily recognized as speech, such as vandalism or trespass. In these "symbolic speech" cases, the claimant contended that he or she had chosen to engage in the prohibited activity in order to dramatize or publicize a particular political viewpoint. As a result, the application of the general health, welfare, or safety regulation to the conduct of this particular actor could be seen as a significant restriction on communicative activity, i.e., "speech." Typical cases involved prohibitions against draft card destruction,[72] burglary or vandalism laws applied to draft board office destruction,[73] and trespass laws applied to all sorts of disruptive "sit-ins" or "occupations" in university office buildings and other places.[74]

These "symbolic speech" cases presented exactly the same problem that the Court had already addressed in the "time, place, or manner cases." Both involved general regulatory restrictions enacted in pursuit of some health, welfare, or safety objective completely unrelated to any communicative import that any particular instance of the regulated activity may or may not have in any particular case. In other words, the action or conduct itself presented the social evil being regulated, whether the action (e.g., noise, destruction of property, or blocking traffic) was communicating something or not. The only factor that distinguishes time, place, or manner cases from symbolic speech cases is the obviousness of the unintended impact on expression. In the former case, the legislature would have known that in pursuit of its nonspeech health, welfare, and safety objective it would be interfering with speech, by regulating conduct that was

70. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981).

71. Id.

72. See, for example, *O'Brien*, 391 U.S. at 367.

73. See, for example, *United States v. Berrigan*, 482 F.2d 171 (3rd. Cir. 1973).

74. See, for example, *Consejo General de Estudiantes de La Universidad de Puerto Rico v. University of Puerto Rico*, 325 F. Supp. 453 (D. P.R. 1971).

commonly chosen as a means of communication. In the symbolic speech cases, however, the regulated conduct was not commonly recognized as a means of communication, and thus the legislature in pursuit of its nonspeech regulatory objective would not have been aware of the unintended impact on speech in the particular circumstances of the case at issue. Unfortunately, the Court initially seemed unaware that its approach to the earlier time, place, or manner cases was readily applicable to these new "symbolic speech" cases. As a result, the Court began to develop and articulate a parallel methodology for these new cases.

The most complete early articulation of the developing methodology for "symbolic speech" cases is the draft card burning case, *United States v. O'Brien*.[75] According to the Court in *O'Brien*, a general conduct regulation that is applied to conduct intended by the particular actor to communicate his or her viewpoint will survive First Amendment challenge if (1) it is within the constitutional power of government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[76] Close inspection of the *O'Brien* criteria leads to the conclusion ultimately reached by the Court in *Clark v. Community for Creative Non-Violence*:[77] the four-part *O'Brien* standard for symbolic speech cases is "little, if any, different" from the standard established by the Court in the long line of time, place, or manner cases.[78]

The first *O'Brien* criterion underlies any constitutional inquiry; it is not a logical step in "symbolic speech" analysis any more than in time, place, or manner analysis, or any other First Amendment analysis. In other words, for purposes of comparing the *O'Brien* criteria to any other First Amendment analysis, the first *O'Brien* criterion

75. 391 U.S. 367 (1968).

76. Id. at 377.

77. 468 U.S. 288 (1984).

78. Id. at 298. Since the two lines of cases present what is analytically the same problem, it should come as no surprise that the two apparently independent and parallel lines of doctrinal development ultimately converged in *Clark*. What should be surprising is the extent to which the Court failed for many years to recognize that the two lines of cases were in all material aspects identical. This tendency to develop a separate methodology for each "category" of cases while ignoring the identity of the underlying problem is pervasive. That in effect is the subject of this entire Article. It is the stated thesis of this Article that the problem of inadvertent interference in the free exercise context and in the establishment context is analytically identical to the problem of inadvertent interference with speech and that the same methodology is applicable to deal with the problem of inadvertence in all First Amendment manifestations.

can be ignored as simply stating a universal prerequisite. The third *O'Brien* criterion is identical in operation to the first and most critical of the time, place, or manner requirements: the regulatory interest at stake must be something other than the suppression of communication. In other words, the impact on expression must be incidental to the pursuit of a nonspeech regulatory objective. In a word, the impact on speech must be inadvertent. The second *O'Brien* criterion is identical to one of the two elements contained in the second time, place, or manner criterion: the nonspeech regulatory objective must be "significant," "substantial," or "important." A trivial regulatory objective that would sustain a regulation against a general substantive due process challenge will not be sufficient where the regulation inadvertently impairs First Amendment speech. The fourth *O'Brien* criterion tracks closely the second element in the second time, place, or manner criterion: the regulation must be narrowly tailored so that it has no greater inadvertent impact on speech than is necessary to effectuate the regnlation's nonspeech regulatory objective. According to *Clark*, the stricter-sounding *O'Brien* formulation of this criterion should not be understood to impose a higher standard than that required by the time, place, or manner analysis.[79]

The only apparent difference between the *O'Brien* criteria and the classic time, place, or manner formulation is that time, place, or manner analysis expressly requires a conscious evaluation of the alternative forms of communication that remain available after application of the challenged regulation. Thus, the Court concluded in *Clark* that the *O'Brien* analysis was subsumed in the more broadly applicable time, place, or manner formulation. In *Clark*, the Court authoritatively summarized the methodology applicable to all cases of inadvertent interferences with expression that occur in the course of pursuing a regulatory objective other than suppression of expression. Such regulations will be upheld if (1) the regulatory objective is unrelated to the content of the regulated expression, (2) the regulation is narrowly tailored to serve a significant governmental interest, and (3) the regulation leaves open adequate alternative channels for communication of the message.[80]

The first of these three criteria embodies the threshold question: Is this regulation a deliberate interference by the legislature in the marketplace of ideas, reflecting a legislative preference for certain viewpoints, or is this truly an inadvertent interference, an unintended

79. Id. at 298.
80. Id. at 293.

by-product resulting from the legislature's pursuit of some nonspeech health, welfare, or safety objective? If all speakers and all viewpoints are subjected to the same regulatory restriction (e.g., limits on noise level) no inference of governmental hostility to a particular message or preference for a competing message arises. If, however, speakers with certain viewpoints are subjected to the regulatory restriction while speakers with other viewpoints are exempted, one can infer that the regulation is intended to impede the dissemination of certain viewpoints. At the very least, one would infer that the legislature considered its health, welfare, or safety objective to be worth pursuing only at the expense of disfavored viewpoints while not worth pursuing at the expense of more preferred viewpoints. In other words, where a health, welfare, or safety regulation is not content neutral,[81] the inference of some deliberate regulatory interference with the free competition of ideas is unavoidable. Thus, this first criterion has come to be known in shorthand as a requirement that the regulation in question be "content neutral." If the regulation is not content neutral, i.e., if it is "content based," it will be invalidated by the same reasoning that is applied to any deliberate legislative attempt to censor disfavored messages.[82]

If the first criterion simply serves to distinguish truly inadvertent interferences from deliberate interferences, the second and third criteria must contain the Court's entire methodology for dealing with inadvertent interferences. At first glance, the second and third criteria appear to state two simple and independent requirements. On somewhat closer inspection, however, the second criterion is seen to contain two separate requirements: the regulation must serve a substantial or important governmental interest (as opposed to the usually adequate "reasonable" objective) *and* the regulation must be narrowly tailored to serve that objective, without inadvertent restrictions on

81. "[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

82. Like other criteria or "tests," this inquiry can be manipulated to allow the Court to classify as inadvertent what actually is a legislative attempt to restrict disfavored communications. As the dissent in *Barnes* pointed out, close inspection of the anti-nudity ordinance in that case suggests that it actually was aimed at certain forms of expressive nudity. 501 U.S. at 592 (White, J., dissenting). Even the general prohibition against draft card destruction upheld in *O'Brien* probably was an attempt by Congress to suppress a particularly effective form of anti-war protest. Protecting the orderly functioning of the draft system was the asserted purpose uncritically accepted by the Court. That purpose, however, seemed to have been adequately served by the longstanding legal requirement that eligible individuals be in possession of their draft cards. Congress's passage of the new anti-destruction law at the time of widespread anti-war protests by draft card burning is hard to dismiss as pure coincidence.

speech that are not necessary for the accomplishment of the regulatory objective. Thus, the second and third *Clark* criteria articulate three operative requirements.

First, *Clark* requires a subjective assessment of the importance of the government's nonspeech regulatory objective. Second, *Clark* requires an assessment of the importance of this particular regulatory means for pursuing the objective when other means might adequately serve the same objective without the same level of inadvertent interference with speech. These first two *Clark* requirements are simply the two parts of a complete assessment of the government's nonspeech interest in regulating any particular activity.

Third, *Clark* requires an assessment of the speaker's ability to use alternative means of communication for his or her message. To the extent that alternative means of expression are available to the speaker, the speech interest in the regulated activity is reduced. Thus, an investigation of the adequacy of alterative means of communication is one part of a complete assessment of the significance of the interference with speech that inadvertently results from regulating a particular communicative activity. The second part of such an assessment, the importance of the speech itself, is simply assumed without explicit statement in cases like *Clark* that involve political messages that are the type of speech at the core of First Amendment protection.

In cases of activity conveying messages that are of "lower First Amendment value" than political speech,[83] it is clear that an assessment of the value of the speech itself is the second part of the Court's evaluation of the extent of the inadvertent interference with speech. Where the Court characterizes the expression involved in the regulated activity as "peripheral" First Amendment free speech, inadvertent interferences with that expression will be more readily found acceptable.[84] Thus, the third explicit *Clark* requirement and the fourth implicit requirement together compose a complete assessment of the individual's speech interest in any particular regulated activity.

Close inspection also reveals that all of the operative terms or concepts in these four requirements are relative, requiring some sort

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83. See, for example, *Barnes*, 501 U.S. at 566 (giving less value to nude dancing as a form of speech).

84. The majority in *Barnes* devalued the speech in order to reduce the level of inadvertent interference: "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." Id.

of judgment of degree or "balancing". First, the nonspeech regulatory interest must be "important" or "substantial". How "important" must the government's regulatory interest be? How much more "substantial" than the usually adequate "reasonable" legislative objective is required, yet still short of "compelling"? Second, the regulation must be "narrowly tailored" to accomplish the legislative objective, without undue inadvertent interference with speech. Since the Court has made it clear that "narrowly tailored" does not mean "least restrictive alterative,"[85] we must wonder just how "narrow," short of "narrowest," the regulation must be to meet this requirement.

Third, the regulation must leave open "adequate" alternative channels of communication. The adequacy of any alternative means of communication would be assessed by the speaker on the basis of a complex calculus involving many factors: size of audience, dramatic impact, potential for additional publicity through news media coverage, cost, and the speaker's financial resources, etc. One confidently can assert that no alternative is adequate in one sense: the speaker can be assumed to have chosen the "best" means of communicating his or her viewpoint after considering the range of factors involved in all of the available alternatives. Thus it is clear that "adequate" means something less than "best," or even "equally good" from the speaker's point of view.[86] Fourth, it must be ascertained whether the expression contained in the regulated activity is the sort that is "central" to the First Amendment or is "at the periphery" of First Amendment concerns or (by implication) ranks somewhere in between, in terms of its contribution to the marketplace of ideas.[87]

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85. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

86. The Supreme Court appears to have overlooked this step of the *Clark* analysis in invalidating the municipal ordinance in *Metromedia, Inc.*, 453 U.S. at 490. San Diego had prohibited all large billboards on private property but had exempted those erected on the site of a business to identify the on-site business. The Court held the ordinance invalid because the signs prohibited were distinguishable from the permitted signs only by their content. San Diego appears, however, to have concluded that effective alternatives were available to off-site billboard advertisers, while no equally effective alternative was available to those seeking to identify the location of their on-site business. Thus, application of the ban to on-site businesses would have been a much larger inadvertent interference with their commercial speech than that experienced by users of off-site billboards. The aesthetic purpose of the regulation justified the lesser inadvertent interference with the speech of those who had ready alternatives but did not justify the greater interference with the speech of those who had no effective alternative. It seems that the city of San Diego may have used a more sophisticated *Clark* analysis in drafting the ordinance than the Supreme Court used in invalidating it.

87. This is the step in the *Clark* analysis that the Supreme Court seems to have overlooked in invalidating the municipal ordinance in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). Cincinnati had prohibited the use of sidewalk newspaper racks by the distributors of free advertising pamphlets or catalogs such as the ubiquitous catalog of local real estate listings. Use of identical sidewalk sales racks by

This demonstration of the relativistic nature of the Court's articulated criteria is not intended as a cheap Socratic trick or the sort of nihilistic exercise in deconstruction that characterizes Critical Legal Theory methodology.[88] Rather, it is intended to demonstrate that the Court's description of its methodology, while useful, simply is not complete. Determinations such as "important," "substantial," "narrow," "adequate," "central," or "peripheral" must be made with reference to something. A study of the many cases where the Court has applied this methodology suggests that in any given case the factors are assessed *with reference to each other*. In other words, the factors are balanced against each other. Stated more fully and more precisely, the *Clark* methodology appears to require that the Court weigh the importance of the government's nonspeech regulatory interest, in light of alternative regulatory schemes available to the government, against the scope of the interference with the actor's speech, in light of the alternative means of communication available to him or her. Where the government's nonspeech regulatory interest is insignificant or where an alternative regulatory scheme would accomplish the objective with minimal impact on speech, a significant inadvertent regulatory impact on speech will not be justified. Conversely, where the speaker's communication is of minimal First Amendment value or where effective alternative means of communication remain available, the inadvertent regulatory impact on speech will be considered acceptable.

If this is not the Court's intuitive understanding of its *Clark* methodology, it ought to be. Indeed, this is the only sensible way to construct a middle course between the Scylla of no First Amendment protection against inadvertent interference and the Charybdis of the paralyzing "compelling interest" test applied to every generally applicable health, welfare, and safety regulation that happens to interfere with some particular individual's off-beat way of expressing herself. No single rule or "objective" standard can be articulated (or even

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traditional newspapers was not prohibited by the ordinance. The Court held the ordinance invalid because the prohibition applied only to certain publications identified by their content and not other publications distinguished only by their content. In contrast, Cincinnati in drafting the ordinance seems to have concluded that its aesthetic interests justified the inadvertent interference with the low value commercial speech in the advertiser's newsracks but did not justify the same level of inadvertent interference with the most highly valued speech of traditional newspapers. As in *Metromedia, Inc.*, the drafters of the Cincinnati ordinance may have employed a more sophisticated *Clark* analysis than the Supreme Court used in invalidating the ordinance.

88. See, for example, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 564-65 (1983).

imagined) to dispose appropriately of the infinite variations in governmental regulatory interests and speaker interests possible in inadvertent interference cases.

The *Clark* methodology was developed in the free speech area to structure, direct, and confine the courts in the process of answering the central question of degree: "Is this inadvertent effect too much?" The *Clark* methodology does not (and could not) eliminate the subjective nature of the ultimate value judgment that must be made in order to answer such a question of degree. But the *Clark* methodology identifies the factors to be weighed in each case (the government's nonspeech regulatory interest and the individual's interest in the communicative aspect of the activity regulated). *Clark* then provides a partial measure for assessing the import of each factor in the specific case (investigating and evaluating alternatives available to the government and to the affected individual under the circumstances). Finally, *Clark* directs that the factors, once assessed in that case, be weighed or measured against each other (a balancing of the extent of the government's nonspeech regulatory interests in that case against the extent of the inadvertent restriction on the speech interests of the individual in that case).

IV. APPLYING THE *CLARK* METHODOLOGY TO RELIGION CLAUSE CASES

A. The Free Exercise Clause

In the line of inadvertent free exercise cases from *Gobitis*[89] to the Court's last word in *Smith*,[90] the Court has continued to struggle with a choice between two doctrinal extremes. On one hand is the *Sherbert-Yoder* approach which, at least as a rhetorical matter, applies the highest and most demanding standard of constitutional review. Taken seriously, this approach will render invalid most general health, welfare, and safety regulations when they are applied to activity that coincidentally happens to be motivated by some sincere religious belief, no matter how obscure or unusual the belief and no matter how unimportant the activity may be in the overall scheme of the religious beliefs in question. On the other hand is the *Gobitis-Smith* doctrine, under which a general health, welfare, or safety regu-

89. 310 U.S. at 586.
90. 494 U.S. at 872.

lation that inadvertently interferes with a particular individual's religion raises no free exercise clause problem at all as long as the government's regulatory objective is strictly nonreligious. Under this approach, a regulation enacted in pursuit of a nonreligious objective will be sustained without any First Amendment review at all, no matter how serious the inadvertent interference with religion and no matter how trivial the government's nonreligious regulatory objective.

This ongoing doctrinal dilemma is solved by the recognition that the problem of inadvertent regulatory interference with the free exercise of religion is conceptually or structurally identical to the problem of inadvertent regulatory interference with free speech.[91] Thus, the *Clark* methodology for dealing with the free speech version of the inadvertent regulation problem is directly transferable to the free exercise of religion version of the inadvertence problem.[92]

Following *Clark* in a free exercise case, the Court should first ask (as it already must under both *Sherbert-Yoder* and *Gobitis-Smith*)

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91. For an early example of the insight that the problems presented by the Free Exercise Clause are analytically identical to those presented by the Free Speech Clause, see Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Comm. 147 (1987). Professor Kamenshine argued that the Court should abandon the charade of strict scrutiny in the *Sherbert* line of free exercise cases and should explicitly adopt the balancing methodology utilized for the free speech claim in *O'Brien*. Id. at 147-54

See also G. Michael McCrossin, Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 Vand. L. Rev. 149 (1980). McCrossin criticized the Court for appearing to give religion a higher level of protection than it gives free speech in cases of inadvertent interference by general laws. Id. at 174. McCrossin suggested a detailed balancing approach for cases of inadvertent interference with free exercise. Id.

A third commentator argued that the Court should apply the same methodology to free exercise and free speech cases because the two clauses protect similar interests. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983). Professor Marshall observed that the Court has sometimes treated religion claims and speech claims as interchangeable, converting an individual's religious objections into a free speech claim. Professor Marshall concluded, as did McCrossin, that free exercise claims should not receive a higher level of protection from general laws than that applied to free speech claims. The tendency to convert free exercise claims into free speech claims may accelerate after the *Smith* holding that inadvertent regulatory interferences with religion raise no First Amendment problem. The same interference with the same activity characterized as speech rather than religion would be subjected to a *Clark* analysis. See, for example, *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 417, 130 L. Ed. 2d 333 (1995), where the claimant abandoned his free exercise claim in the District Court but carried essentially the same claim characterized as free speech to the U.S. Supreme Court.

92. Professor Seeburger criticized the Court's purported use of the compelling interest test in free exercise cases: "The test recoguizes no distinctions in the degrees, directness, or types of burdens and is insensitive to differences in governmental policy." Richard H. Seeburger, *Public Policy Against Religion: Doubting Thomas*, 11 Pepp. L. Rev. 311, 320 (1984). Professor Seeburger suggested the substitution of a fact-oriented balancing test that considers all relevant factors such as the strength of the governmental interest, the existence of less burdensome alternatives, the degree of burden on the claimant's religious interest, and the importance of the individual religious interest. Id. at 312, 328-29.

whether the regulatory impact on religion was the result of an attempt by the majority to impose its religious preferences on nonconformist minority religions. Alternatively, was the impact on particular minority religious practices simply an inadvertent effect of a regulation adopted in pursuit of general nonreligious health, welfare, or safety objectives? If the impact on religion is a deliberate attempt to impose the religious objectives of the legislative majority, the regulation is a per se violation of the Free Exercise Clause. If, however, the impact on religion was an unintended effect of a general regulation pursuing nonreligious objectives, the Court must decide whether the unintended effect on religion is too great to be permitted under the Free Exercise Clause.

Although not recognized as the first step in a *Clark* analysis, this first question and its analytical consequences seem firmly established in current free exercise jurisprudence. In its 1993 decision in *Church of the Lukume Babalu Aye v. City of Hialeah*,[93] the Court held unconstitutional four city ordinances that prohibited the sacrifice of animals as part of a religious ritual. The Court noted that the ordinances only outlawed the killing of animals for religious purposes. The ordinances permitted killing animals for almost any other reason, including pest control, commercial slaughter, and sport.[94] City officials had enacted the ordinances only after community residents complained about an individual's announced plans to establish a Santerian church in the largely Hispanic suburb.[95] During the discussion of the proposed ordinances, city council members repeatedly criticized Santeria and branded it undesirable.[96] The Court found that the selective scope of the prohibition in the ordinances, combined with the legislative history and the circumstances surrounding their enactment, established that the ordinances were specifically designed to suppress the Santerian church.[97]

In his opinion for the majority, Justice Kennedy asserted that "[t]hose in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of

93. 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

94. Id. at 2228-29.

95. Id. at 2223. The Santerian church is an African-Cuban religious group that occasionally utilizes ritual sacrifice of animals, usually chickens, sheep or goats. Id. at 2222.

96. Id. at 2231. At one meeting, the council president asked: "What can we do to prevent the church from opening?" Id. at 2231. A second council member charged that the Bible allows animal slaughtor only for food consumption. Id. A police department chaplain asserted that Santeria is "an abomination to the Lord" and urged the council "not to permit the church to exist." Id.

97. Id.

law and regulation are secular."[98] To Justice Kennedy it was clear that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void."[99] In other words, the Hialeah ordinances failed the first standard in a *Clark* analysis. Because the interference with religion was the deliberate objective of the ordinances, not an inadvertent by-product of a regulatory measure designed to accomplish nonreligious objectives, the ordinances were per se violations of the Free Exercise Clause.[100]

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98. Id. at 2234.

99. Id.

100. The various opinions in *Hialeah* may have muddied the water surrounding even this simple and straightforward proposition. The decision in *Hialeah* was unanimous and each of the several opinions ultimately seems to be based on some form of per se unconstitutionality because the regulatory interference with religion was deliberate. However, the rhetorical constructs employed in several of the opinions add considerable confusion to what should have been a very simple case.

Justice Kennedy's opinion for the Court concludes rather quickly and confidently that the ordinances in question were "an impermissible attempt to target petitioners and their religious practices" and that "[t]he ordinances had as their object the suppression of religion." Id. at 2228, 2231. Nonetheless, the opinion then purports to apply "the most rigorous of scrutiny" to ascertain whether the ordinances " 'advance interests of the highest order' and [are] narrowly tailored in pursuit of those interests." Id. at 2233. The opinion cites *Yoder*, a classic case of inadvertent regulatory impact, as authority for this standard of review which Kennedy (but not *Yoder*) characterizes as "[t]he compelling interest standard." Id. In the end, Justice Kennedy finds that the ordinances fail this standard of review precisely because they are not rules of general applicability but are aimed only at religion. Id. at 2233-34.

Justice Soutor's opinion states at the outset that "[t]his case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur . . . ." Id. at 2240. Nonetheless, Justice Souter's concurrence moves on to criticize what he calls dicta in the Court's opinion concerning the *Smith* methodology for dealing with inadvertent regulatory interferences with religion. In the course of that discussion, Justice Souter observed: "[W]e have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise . . . ." Id. at 2243. In his attempt to raise the level of scrutiny imposed in cases of inadvertent interference after *Smith*, Justice Souter seems to have suggested that the approach to cases of deliberate interference should be some form of strict scrutiny rather than the finding of per se unconstitutionality with which his opinion began.

Justice Blackmun's concurrence, joined by Justice O'Connor, states that "[w]hen the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by 'showing that it is the least restrictive means of achieving some compelling state interest.' " Id. at 2250. For this proposition, Justice Blackmun cites *Thomas v. Review Board*, 450 U.S. 707 (1981), a classic case of inadvertent interference virtually identical to *Sherbert* in facts and result. Justice Blackmun then concludes, however, that a "regulation that targets religion in this way, ipso facto, fails strict scrutiny." Id. at 2251.

The conspicuous absence of any such finding or any similar language in the line of decisions from *Sherbert* through *Smith*[101] suggests that the Court was at least intuitively aware that any governmentally imposed impediment to religious practice in those cases was an unintended consequence of the government's pursuit of some clearly nonreligious objective.[102] In *Lyng v. Northwest Indian Cemetary Protection Association*,[103] Justice O'Connor's majority opinion characterized such inadvertent impacts on religion as "indirect coercion or penalties on the free exercise of religion"[104] and as "incidental effects of government programs,"[105] which she contrasts with "outright prohibitions"[106] on free exercise. Justice Scalia's

101. This much discussed line of cases includes *Sherbert*, 374 U.S. at 398 (involving the denial of unemployment benefits to a plaintiff who refused, pursuant to her religious beliefs, to work on Saturday); *Yoder*, 406 U.S. at 205 (involving the application of a compulsory education law to the Amish contrary to their religious belief); *Lee*, 455 U.S. at 252 (involving the application of a Social Security tax to an Amish employer in spite of his religious objection to the Social Security system); *Bob Jones University*, 461 U.S. at 574 (involving the denial of a tax exemption to a religious college because of its religiously based ban on interracial dating); *Lyng*, 485 U.S. at 439 (involving the construction of a U.S. Forest Service road through a sacred Native American site on federal government property); *Smith*, 494 U.S. at 872 (involving the denial of unemployment benefits to a former state employee who lost his job because of peyote use in conformity with his religion).

102. The Court's finding that the unavailability of benefits acted as a penalty on the exercise of religious choice in both *Sherbert* and *Smith* is open to serious question. If the claimants had chosen to ignore the dictates of their religion, they would have been employed and thus still would not have been eligible for benefits. In other words, the benefit scheme in each case presented no motivation or reward for foregoing the exercise of religion because the claimants would not have been able to collect benefits either way. In each case, the government simply refused to subsidize the individual's choice not to work whether that choice was motivated by a desire to conform to religion or a desire to go fishing.

The *Sherbert* holding and the similar result in *Thomas* forced the state to subsidize an individual's choice of religion over competing unsubsidized options such as fishing or watching television. This point was emphasized by Justice Stewart concurring in *Sherbert*, 374 U.S. at 414-15 (Stewart, J., concurring), and by Justices Harlan and White dissenting, id. at 422 (Harlan, J., and White, J., dissenting). Thus, the Court's result in *Sherbert* and *Thomas* is itself a rather obvious violation of the Establishment Clause, while the invalidated state benefit schemes actually raised no free exercise problem. (An exception in *Sherbert* for those who refused to work on Saturday probably was a violation of the Establishment Clause, but the Court's analysis overlooked this aspect of the case).

In contrast, the Court avoided this serious mistake in the structurally identical free speech case of *Lyng v. United Auto Workers*, 485 U.S. 360 (1988). In that case, the Court confronted a claim by a striking worker that the denial of extra foodstamp benefits to replace income lost by striking constituted a *Sherbert* penalty on his freedom of speech and association. Id. at 362-63. The Court rejected the plaintiff's argument because he still would have been ineligible for benefits if he had foregone his First Amendment freedoms and had remained at work. Id. at 364-68. The Court concluded that the state had not withheld anything from him because he chose not to work. Id. The state merely had refused to subsidize his choice, no matter what the reason may have been for his choice. Id.

103. 485 U.S. 439 (1988).

104. Id. at 450.

105. Id.

106. Id.

opinion for the Court in *Smith* distinguished cases of inadvertent impact on religion such as *Smith* from cases of deliberate regulation of religion.[107] In the former cases, according to Justice Scalia, "prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision . . . ."[108] In the latter cases, which he noted were extremely rare, Justice Scalia observed that the regulation "would doubtless be unconstitutional."[109] Since the legislative majority rarely sets out consciously to impose religious orthodoxy by law, and since there was no implication of any such intent in those cases, the Court's intuitive classification of the *Sherbert*-to-*Smith* line of cases as inadvertent interference cases seems to have been clearly correct.

The next step in the *Clark*[110] analysis should be an explicit assessment of the importance of the legislature's nonreligious objective and of the availability of alternative measures that would serve the objective with less impact on religion. This two-part assessment of the government's nonreligious interest in the regulation should then be weighed or balanced against an assessment of the importance to the individual of the restriction on his or her religiously motivated conduct and the availability of alternative courses of conduct that would serve the individual's religious purposes nearly as well as the prohibited conduct.

In fact, what one finds upon close inspection of the Court's handling of the cases following *Clark* is that the outcome in each case appears to have been dictated by one or more of the *Clark* factors, although identified only obliquely in the Court's opinion and never expressly balanced against the other factors. In *Sherbert*,[111] the state had refused unemployment compensation to a Sabbatarian claimant who refused to accept an available job that would have required Saturday work in violation of her religious beliefs. Behind a veil of strict scrutiny rhetoric, the Court appears to have concluded that the state's objective in establishing an unemployment compensation scheme could be served almost as well if religious believers were exempted from the requirement that they accept work on their day of religious observance.[112] On the other hand, requiring an individual to accept work on her day of religious worship would constitute a serious

107. 494 U.S. at 877-88.
108. Id. at 878.
109. Id. at 877.
110. 468 U.S. at 288.
111. 374 U.S. at 398.
112. Id. at 406-09.

interference with an important element of traditional religious beliefs.[113] Since no available alternative course of action would serve the individual's religious purposes, the serious inadvertent interference with religion outweighed the state's nonreligious interests in the requirement.

Similarly, the Court in *Yoder*[114] concluded that the state's interest in the application of its compulsory high school education laws to Old Order Amish was outweighed by the serious though inadvertent interference with Amish religious beliefs and practices. Although the Court conceded that the state had a substantial interest in guaranteeing that its citizenry were well educated, and thus equipped for participation in modern community life, the Court noted that such an interest was of less importance in the case of Amish children.[115] Amish children would be expected to mature and function in a technologically simple society for which Amish family home schooling adequately equipped them.[116] On the other hand, forcing Amish families to send their children to cosmopolitan high schools frustrated the Amish family's fundamental religious belief that children should be raised to shun most technological conveniences.[117] No alternative course of action was available to the Amish to serve their religious objectives. In contrast, the state's system of compulsory education to produce a competent citizenry would be served almost as well if Amish children were exempted. Thus, an intuitive *Clark* analysis led to the conclusion that the inadvertent impact of the compulsory education laws on the Amish religion violated the Free Exercise Clause.

The same intuitive *Clark* analysis produced the opposite outcome in *Lee*,[118] *Bob Jones University*,[119] and *Lyng*.[120] In *Lee*, the government's interest in raising tax revenue by applying the social security tax to an employer who objected to payment on religious grounds was held sufficient to justify the inadvertent impact on the employer's religion.[121] Required payment of the tax would flatly contravene the asserted religious belief and no alternative course of action short of nonpayment would comport with the employer's

113. Id. at 404.
114. 406 U.S. at 205.
115. Id. at 225-29.
116. Id. at 225.
117. Id. at 226-27.
118. 455 U.S.at 252.
119. 461 U.S. at 574.
120. 485 U.S. at 439.
121. 455 U.S. at 260-61.

religious beliefs. Nonetheless, the impact on religion was held to be outweighed by the government's interest in revenue raising, the equitable distribution of the tax burden on all employers, including the religious objector in this case, and the avoidance of the burden of administering religious exemptions from the tax.[122] Although none of the listed governmental interests, separately or together, approached what would be considered "compelling" by the usual measure, they were enough to outweigh the inadvertent impact on religion. A careful reading of the Court's opinion suggests that the Court simply was not convinced that nonpayment of the tax was an important or "central" tenet of the objector's religion.[123] In other words, the inadvertent but unavoidable impact on religion was minimal, and thus was easily outweighed by a collection of very ordinary governmental interests.

In *Bob Jones University*[124] the Court confronted a free exercise challenge to an Internal Revenue Service ("IRS") attempt to withdraw the tax exempt status of a private religious college because its ban on interracial dating was considered race discrimination. Bob Jones University asserted that the ban on interracial dating reflected the religious tenets of the University, and thus challenged the IRS's action as a penalty on its free exercise of religion.[125] The Court purported to apply the compelling interest test[126] to this deliberate regulatory penalty on race discrimination that only inadvertently impacted on religion because of the peculiar religious belief asserted by the University. If we are to take the compelling interest test seriously in this context, it is quite surprising that the Court found a compelling governmental interest in the dating policies of a small religious college. On the other hand, it seems apparent that the Court was not impressed with the University's claim that a ban on interracial dating was at the center of its more-or-less traditional body of Christian theological beliefs. In essence, the inadvertent impact on the religious beliefs and practices of Bob Jones University was not sufficient to outweigh the government's far-from-compelling interest in discouraging race discrimination in this isolated segment

122. Id.

123. "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." Id. at 261.

124. 461 U.S. at 574.

125. Id. at 581-82.

126. Id. at 603-04.

of society. As Justice Scalia later pointed out in *Smith*,[127] accepting at face value the Court's assertion that the compelling interest test was met in this case simply devalues that "test" to the point of near uselessness.

Finally, in *Lyng*,[128] Justice O'Connor writing for the Court expressly rejected the compelling interest test or other forms of strict scrutiny as appropriate methodologies for cases of inadvertent governmental impact on the free exercise of religion. *Lyng* presented a free exercise clause challenge to a United States Forest Service plan to construct a logging road through, and permit timber harvesting in, an area of national forest traditionally used by the complaining Indian tribes for sacred religious rituals.[129] Justice O'Connor's opinion acknowledged that the tribes' beliefs were sincere and that execution of the Forest Service's plans would severely damage the tribes' preferred sites for religious observances.[130] Nonetheless, Justice O'Connor discounted the impact on the religious practices of the tribes because the road construction would simply force them to use other locations for their rituals.[131] Because alternative courses of action were available to serve the religious purposes of the tribes, though admittedly not as well as the preferred site, the inadvertent impact on religion was acceptable when measured against the very ordinary government interests served by the challenged logging program.

Upon close inspection, the Court's methodology in the free exercise clause cases prior to *Smith* appears to be a poorly articulated and largely intuitive form of the inadvertence jurisprudence that has been much more clearly formulated in the free speech clause cases.[132] Unfortunately, the Court's failure to articulate a coherent approach that reflected what it was doing intuitively on a case-by-case basis led to judicial and scholarly calls simply to abandon the entire line of authority from *Sherbert* to *Lyng* as hopelessly inconsistent. *Smith*[133] was the almost inevitable result. Ironically, the author of the Court's opinion in *Smith*, Justice Scalia, now seeks to rely on his handiwork in that case as authority for rejecting the much more well-conceived

127. 494 U.S. at 888-89.
128. 485 U.S. at 439.
129. Id. at 441-42.
130. Id. at 447.
131. Id. at 454-55.
132. See, for example, *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205; *Lee*, 455 U.S. at 252; *Bob Jones University*, 461 U.S. at 574; *Lyng*, 485 U.S. at 439.
133. 494 U.S. at 872.

and articulated *Clark* methodology for dealing with inadvertence in free speech cases![134] The Court simply could not produce a more backwards result than that.

It can be argued that the *Clark* methodology is workable in the free speech context because the Court is capable of assessing the seriousness of the impact on a particular speaker's ability to communicate and the utility of alternative means by which the speaker can still disseminate his or her message. On the other hand, the Court simply cannot assess the importance to the individual of any specific impairment of religion and cannot, with any confidence, evaluate the religious utility of alternative courses of action available to the claimant.[135] While there is considerable force to this argument that the *Clark* free speech methodology will be harder to apply in the context of free exercise of religion claims, it does not follow that we should abandon the effort altogether.

It seems clear that in applying the *Clark* methodology in a free exercise context, the Court inevitably will tend to measure the impact on minority religion by imposing its own subjective assessment of the worth of the religious practice in question and probably the worth of the whole religious belief system that produces the practice in question. In other words, the majoritarian religious assumptions of the current members of the Court will to some extent dictate the value attached in the *Clark* methodology to the impacted religious practice and to alternative courses of conduct suggested to fill the same religious purpose. Stated more bluntly, the *Clark* methodology, in the hands of a religiously mainstream Court, will tend to undervalue and thus underprotect off-beat minority religions in the face of inadvertent regulatory intrusions. Justice Scalia concludes from such problems in *Smith* that we should therefore reject any attempt to protect minority religions at all in a case of inadvertent impact.[136] Until confronting Justice Scalia's legal legerdemain in *Smith*, one confidently would have asserted that a risk of underprotection for a minority religion was far better than no protection at all.

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134. *Barnes*, 501 U.S. at 578-79 (Scalia, J., concurring).

135. See, for example, Perry Dane, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L. J. 350, 360 (1980) (arguing that courts cannot competently differentiate between activities that are central and those that are peripheral to a given religion). See also Berg, 39 Vill. L. Rev. 1 (cited in note 44).

136. 494 U.S. at 886-87.

B. The Establishment Clause

Part II.B of this Article concluded that in each establishment clause case the *Lemon* "test" boiled down to a single central *question*: Is the inadvertent aid to or apparent endorsement of religion in this case too much? While *Lemon* and subsequent cases intuitively ask the right question (though in a convoluted form), they provide no guidance at all on how a court should proceed to answer the question in a specific case. *Lemon* and subsequent cases supply no frame of reference for identifying the factors that are relevant to a determination of "too much" and no analytical structure for evaluating the import of any factors that might be identified. The result in each *Lemon* case unavoidably is a gross, unstructured, unarticulated, subjective value judgment that the specific instance of inadvertent "establishment" is or is not "too much." It is little wonder that case-by-case results obtained by applying the *Lemon* "test" appear inconsistent, suggesting that different factors were considered or that different standards of measurement were applied to the same factors in each case.

The basic analytical framework of *Clark* should be explicitly applied in establishment clause cases to answer the central question posed, but not answered, by the *Lemon* "test." Following *Clark* in a *Lemon* case, the Court should ask first (as it does under *Lemon*) whether aid[137] to or endorsement of religion was the purpose of the challenged governmental action or was simply an inadvertent side effect of a government program designed to pursue a nonreligious governmental objective. If the aid or endorsement is deliberate, it is a per se violation of the Establishment Clause. If, however, we find that aid or apparent endorsement was an unintended effect[138] of a

137. In a case of economic aid to religion, such as providing fire and police protection or sewer and water service to church property, the first question should be whether the government service somehow aids the religion in a way different from or in excess of the assistance provided to all other property owners. If the service is provided equally to religious and nonreligious recipients, religion has not in any way been advanced or advantaged over any other activity. If the aid does not give religion an economic edge or advantage over competing activities, there is in fact no aid at all, deliberate or inadvertent, with which the Establishment Clause should be concerned. In other words, the Establishment Clause is not implicated by governmental economic aid universally available to all, including religion. "Aid" in the establishment clause context must be understood to mean only *competitive* aid—aid that advances religion over competing activities or belief systems. It is difficult in this context to explain why property tax exemptions for church property are not per se violations of the Establishment Clause. They are best explained as an historic anomaly traceable to misplaced concerns about equally-applied taxes violating the Free Exercise Clause.

138. See, for example, *Mueller*, 463 U.S. at 388, where tax deductions for tuition, textbooks, and transportation expenses incurred for the elementary and secondary education of

governmental program pursuing nonreligious objectives, we must decide whether the unintended effect is too much to be permitted under the Establishment Clause.

Clark suggests that to answer the question posed by these cases, the Court should explicitly assess the importance of the government's nonreligious objectives in implementing the challenged program and the alternative courses of action through which the government might pursue its nonreligious objectives with less unintended aid to or apparent endorsement of religion.[139] Following *Clark*, this two-part assessment of the government's nonreligious interest in the challenged program should then be weighed or balanced against an assessment of the aid or apparent endorsement of religion that inadvertently results from the government program.

The Court should rehabilitate the besieged *Lemon* test by refining and rearticulating it to parallel the balancing of interests explicitly required by the *Clark* methodology. The government program at issue should be upheld in the face of an establishment clause challenge when a conscious assessment of the three relevant factors suggests that (a) the government's nonreligious objective is significant, (b) any alternative measure that might entail significantly less aid or appearance of endorsement would not accomplish the government's nonreligious objectives nearly as well, and (c) the unavoidable inadvertent aid or appearance of endorsement of religion is not substantial. However, the government program should be held to violate the Establishment Clause when a conscious assessment of the three factors suggests that (a) the government's nonreligious objective is not very important, or (b) the objective could be achieved nearly as effectively by alternative means that would not entail as much inadvertent aid to or apparent endorsement of religion, and (c) the inadvertent aid or appearance of endorsement is substantial. If an effective alternative measure that would entail less aid or appearance of endorsement is available, it must be substituted for the challenged program. If no effective alternative is available and the government's nonreligious objective is insubstantial relative to the amount of unintended aid to or apparent endorsement of religion, the

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dependents appeared to help those who sent children to parochial schools. The state's legitimate primary purpose, however, was to subsidize universal education.

139. The classic *Lemon* "test" lacks any articulated consideration of the government's nonreligious objectives and of any alternative measures available to the government that would entail less appearance of endorsement of religion.

government program must be discontinued and the government's nonreligious objectives sacrificed.

Assessing the importance of the government's nonreligious objectives in the challenged program and the availability of alternative government approaches that would entail less aid to or appearance of endorsement of religion is the sort of task that the Court routinely performs.[140] Assessing the significance of the aid to or apparent endorsement of religion admittedly is somewhat more difficult. That, however, is precisely what the Court has long been inarticulately required to do in applying the *Lemon* "test." As noted earlier, the notions of "primary" effect and "excessive" entanglement are hardly self-defining. At most, they suggest the need for a determination of degree by comparison with other imaginable fact patterns. The *Lemon* formulation implies that in some cases of unintentional aid, the aid would not be the "primary" effect of the government program, but only a lesser, and thus permissible, "secondary" effect.[141] In cases of apparent endorsement by close association between government agents and religious agents, the inadvertent appearance of endorsement by "entanglement" would in some cases not be "excessive" and thus would be permissible.[142]

Several of the Court's more recent establishment clause cases, which are sometimes thought to be inconsistent with each other or with earlier cases,[143] can best be explained as examples of intuitive *Clark* analysis poorly articulated in *Lemon* rhetoric. The doctrinal centerpiece in this collection of cases is *Mueller v. Allen*.[144] *Mueller* presented an establishment clause challenge to a state income tax exemption for actual expenses up to $700 incurred for tuition, textbooks, and transportation for the elementary or secondary education of dependents. Although the deduction was available to all parents, parents whose children attended public schools did not incur such expenses. Thus, only parents of private school students were able to utilize the deduction, and most private school students attended

140. See, for example, *Mueller*, 463 U.S. at 396-97 (observing that a Minnesota tax "deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes"); *Allen*, 392 U.S. at 243-45 (noting that the state had a strong interest in education and that the aid program in question minimized establishment clause concerns).

141. See, for example, *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 396-402; *Wolman*, 433 U.S. at 242. See Part II.B for a discussion of the *Lemon* test.

142. See *Zobrest*, 113 S. Ct. at 2468-69; *Wolman*, 433 U.S. at 248.

143. See, for example, *Jaffree*, 472 U.S. at 110-11 (Rehnquist, J., dissenting) (listing a series of decisions which Justice Rehnquist views as contradicting each other).

144. 463 U.S. 388 (1983).

parochial schools.[145] Applying the *Lemon* rhetoric, Justice Rehnquist writing for the Court concluded that the tax exemption scheme had a secular purpose (subsidizing universal education), that the primary effect was not the advancement of religion, and that the scheme obviously involved little or no "entanglement" through close association between agents of the state and agents of religion.[146]

The companion cases of *Grand Rapids School District v. Ball*[147] and *Aguilar v. Felton*[148] involved state schemes that placed state-paid public school teachers in parochial schools to conduct secular classes such as remedial reading. The *Grand Rapids* program also paid parochial school teachers to conduct secular community education classes in the parochial school building after school hours.[149] Justice Brennan's opinions for the Court in both cases concluded that the state schemes violated the Establishment Clause.

Justice Brennan suggested in *Grand Rapids* that the public school teachers might be subtly influenced by their parochial school surroundings to incorporate religious messages into their secular classes.[150] He was also concerned that the parochial school teachers might continue to pursue a religious mission in their state-supported after-hours community education courses on secular topics.[151] Justice Brennan, possibly unconvinced of his articulated concern that the public school teachers would be seduced and corrupted by religion, went on to articulate what must have been the Court's real concern. He pointed out that "[g]overnment promotes religion . . . when it fosters a close identification of its powers and responsibilities with those of any-or-all religious denominations . . . ."[152] Justice Brennan characterized the *Grand Rapids* program as "the symbolic union of government and religion in one sectarian enterprise . . . ."[153] This was, according to Justice Brennan, simply "an impermissible effect under the Establishment Clause."[154]

Possibly anticipating Justice Brennan's purported concern about the corruption of the public school teachers in *Grand Rapids*, the state in *Aguilar* had provided a system of state supervisors to

145. Id. at 391.
146. Id. at 394-403.
147. 473 U.S. 373 (1985).
148. 473 U.S. 402 (1985).
149. 473 U.S. at 376-77.
150. Id. at 385-87.
151. Id. at 386-89.
152. Id. at 389.
153. Id. at 392.
154. Id.

guarantee that the public school teachers working in the parochial schools would not participate in religious education.[155] Nonetheless, Justice Brennan found the scheme in *Aguilar* to be a violation of the Establishment Clause, relying solely on the entanglement-by-association branch of the *Grand Rapids* analysis. Indeed, from that perspective, Justice Brennan found the *Aguilar* scheme even more constitutionally objectionable than the *Grand Rapids* scheme because the activities of the state supervisors added a further layer of visible association between agents of the state and agents of religion.[156]

Witters v. Washington Dept. of Services for the Blind[157] presented a challenge to a law authorizing reimbursement for vocational rehabilitation costs of visually handicapped individuals. An individual recipient had used his state-provided benefits to pay his tuition for courses at a religious college to prepare him for a career in religious ministry.[158] The case of *Zobrest v. Catalina Foothills School District*[159] arose because a deaf student in a parochial high school requested the assignment of a state-supplied sign-language interpreter for his classroom use.[160] Although the state supplied such services to students of public schools, the state argued that providing similar assistance to a student in a parochial school would violate the Establishment Clause.[161] Thus, both cases involved state aid to a broad class of disabled individuals, a few of whom chose to use that assistance to pursue, at least in part, their own religious objectives. In addition, *Zobrest* presented the problem of a state employee physically present in the classes of a parochial school, at least somewhat similar in that respect to the schemes held unconstitutional in *Grand Rapids* and *Aguilar*.[162] In *Witters*, the Court, in multiple opinions that relied heavily on *Mueller*, found that the state program did not violate the Establishment Clause.[163] In *Zobrest*, Justice Rehnquist writing for the majority relied on the *Witters-Mueller* line of analysis to uphold the government program of assisting parochial school students by supplying sign language interpreters throughout the class day.[164]

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155. 473 U.S. at 406-07.
156. Id. at 413-14.
157. 474 U.S. 481 (1986).
158. Id. at 483.
159. 113 S. Ct. 2462 (1993).
160. Id. at 2464.
161. Id.
162. Id. See notes 147-56 and accompanying text.
163. Id. at 485 (Marshall, J., writing for the Court); id. at 490 (White, J., concurring); id. at 490-92 (Powell, J., concurring); id. at 493 (O'Connor, J., concurring).
164. 113 S. Ct. at 2466-69.

These five cases, and some earlier cases,[165] are often criticized because they appear to turn on two factors.[166] The first factor is the identity of the direct recipients of the aid. If the aid is directed at individuals who utilize the aid in pursuit of their own religious objectives, the program is more likely to be upheld. In contrast, if the aid flows directly to the parochial schools, the program is more likely to be held unconstitutional. The second factor is the breadth or inclusiveness of the class of those eligible to receive the aid. The broader the class of eligible beneficiaries, the more likely the Court is to sustain the aid scheme in the face of an establishment clause challenge.

In contrast to the criticism often leveled at these decisions, a *Clark* analysis suggests that these two factors should largely determine the outcome in such cases and that the Court in fact reached an appropriate result in each case. The Court quickly and easily concluded in each case that the state's purpose was purely secular[167] and that any aid to religion or apparent endorsement of religion was an unintended by-product of the state's pursuit of its secular objective. The question confronting the Court then in each case was whether the inadvertent aid to or apparent endorsement of religion was too much to tolerate under the Establishment Clause. In these cases, any actual aid to religion compared to competing activities was fairly minimal. In cases like *Zobrest*,[168] *Witters*,[169] and the earlier case of *Everson v. Board of Education*,[170] one can argue that the state aid assisted some individuals in obtaining religious components, as well as the intended secular components, of the education.[171] In *Mueller*,[172] *Grand Rapids*,[173] and *Aguilar*,[174] on the other hand, the assistance seemed well-confined to the nonreligious elements of the education, and much

165. *Allen*, 392 U.S. at 236 (holding that the state may lend books to parochial school students); *Wolman*, 433 U.S. at 229 (holding that the state may not constitutionally lend maps, magazines, transparencies and other similar instructional materials to parochial schools); *Mueller*, 463 U.S. at 388 (upholding a system of tax deductions for parents of parochial school students).

166. See, for example, *Zobrest*, 113 S. Ct. at 2472-74 (Blackmun, J., dissenting) (criticizing the majority for relying on two questionable factors in its opinion).

167. *Mueller*, 463 U.S. at 394; *Grand Rapids*, 473 U.S. at 383; *Aguilar*, 473 U.S. at 414; *Witters*, 474 U.S. at 485; *Zobrest*, 113 S. Ct. at 2467.

168. 113 S. Ct. at 2462.

169. 474 U.S. at 481.

170. 330 U.S. 1 (1947).

171. See, for example, *Zobrest*, 113 S. Ct. at 2472 (Blackmun, J., dissenting) (noting that the functions of secondary education and advancement of religious values were inextricably intertwined at the institution in question).

172. 463 U.S. at 388.

173. 473 U.S. at 373.

174. 473 U.S. at 402.

more assistance of that same secular sort already was being provided to those who chose to attend public schools.

Thus, the real problem confronting the Court in each case was that the challenged state program would to some degree appear to the general public to be state support for or endorsement of religion even though the actual competitive aid[175] was minimal or zero.[176] Following the *Clark* methodology, albeit intuitively and inarticulately, the Court was required to assess the extent of this inadvertent appearance of aid to or endorsement of religion in each case. The two factors that seemed to influence the Court's analysis, identity of the direct recipients of the aid and breadth of the class of eligible recipients, are the most central elements in any intelligent assessment of the appearance of endorsement of religion.

Where individuals, rather than religious institutions, are the direct recipients of education grants, there is far less appearance of endorsement of religion, even if a large number of the individual recipients independently choose to expend their grants on educational programs with religious components. Furthermore, where all members of a class defined by nonreligious characteristics (e.g., all elementary or secondary students) are eligible for the grants on equal terms, there is little reason for the general public to draw an inference that the program is intended to aid or endorse religion. The Court's reliance on these factors is criticized because they are essentially matters of form.[177] But the appearance of aid or endorsement, i.e., inadvertent

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175. See note 137 for a discussion of competitive aid.

176. In *Grand Rapids*, for example, the Court concluded that "[g]overnment 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. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." 473 U.S. at 385.

Echoing similar concerns, Justice Blackmun in *Zobrest* reasoned that the "union of church and state in pursuit of a common enterprise is likely to place the imprimatur of government approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets." 113 S. Ct. at 2474 (Blackmun, J., dissenting).

James M. Lewis and Michael L. Vild chronicle the emergence of the endorsement test in the Court's establishment clause jurisprudence. Note, *A Controversial Twist of* Lemon*: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990). The Note locates the test's genesis in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984). According to Justice O'Connor, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *Lynch*, 465 U.S. at 690. Eventually, this view attracted a majority of the Court in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 594-98 (1989).

177. The Court's opinion in *Grand Rapids* denounces the "fiction that a . . . program could be saved by masking it as aid to individual students." 473 U.S. at 395. The opinion in *Wolman*

establishment, is essentially a function of form. The Court's continued emphasis on these factors in inadvertent establishment cases is entirely appropriate if one recognizes that the *Lemon* test is simply a crude and confusingly articulated version of the *Clark* analysis for cases of inadvertent effects.

In *Grand Rapids*[178] and *Aguilar*[179] the direct and immediate "recipients" of the state program appeared to be the parochial schools and parochial school personnel. The Court clearly articulated its conclusion that the inadvertent endorsement of religion was very substantial.[180] Unarticulated, but essential to the result in the case, was the Court's intuitive judgment that the state's secular objectives were not all that important or (more likely) that they could be accomplished equally well by a program with far less inadvertent entanglement-by-association with religion. Indeed, it is easy to imagine ways in which the state might equally well have accomplished its objectives with little or no "entanglement" with religion at all.[181] Thus, the inadvertent "establishment" in *Grand Rapids* and *Aguilar* outweighed the state's secular interests in the program.

On the other hand, the state benefits in *Mueller*,[182] *Witters*,[183] and *Zobrest*[184] were made available to individuals rather than religious institutions and the class of individuals eligible for benefits was defined broadly by criteria entirely independent of religion. Thus, in terms of the two central factors, the inadvertent implication of state endorsement of religion simply was not significant. Unarticulated, but again necessary to the result in those cases, was an intuitive judgment by the Court that no readily available alternative approach would adequately accomplish the state's secular objectives, while significantly reducing the remaining inadvertent endorsement. Thus, the state program in each of these cases passed muster under an intuitive *Clark* analysis of the establishment clause problem.

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asserts that it would "exalt form over substance if this distinction [between loaning equipment to the pupil or his parent and loaning it directly to the school] were found to justify" a different result. 433 U.S. at 250.

178. 473 U.S. at 373.

179. 473 U.S. at 402.

180. *Grand Rapids*, 473 U.S. at 397; *Aguilar*, 473 U.S. at 414.

181. For example, the classes in question could have been offered in the public school building.

182. 463 U.S. at 388.

183. 474 U.S. at 481.

184. 113 S. Ct. at 2462.

The 1993 case of *Lamb's Chapel v. Center Moriches Union Free School District*[185] presents what may be the Court's closest approach to articulating the *Clark* methodology as a response to an establishment clause claim. In that case, the school board regularly had allowed nonreligious organizations to use school premises during non-school hours "for social or civic purposes."[186] The board, however, refused to allow a church group to use the school facilities during non-school hours to show a film on parenting and family values. The Court held that the board's action was viewpoint discrimination that clearly violated the Free Speech Clause.[187]

The school board had argued that it must discriminate against religion (or prohibit all non-school use of the facilities) in order to avoid a violation of the Establishment Clause.[188] The Court rejected the anticipated establishment clause challenge to church use of the school facilities on the grounds that equal access by all users including religious groups would raise "no realistic danger that the community would think that the [School] District was endorsing religion or any particular creed . . . ."[189] In *Clark* terms, the objective of the government program to aid all social and civic groups, by providing otherwise unused meeting space,[190] was sufficiently important to outweigh the minimal amount of unintended apparent endorsement of religion that might result.[191] Because the Free Speech Clause prohibited operating the aid program while excluding religious groups, there was no readily available alternative form of the program that would involve a lower level of apparent endorsement of religion. In short, the inadvertent endorsement of religion that would result from including religion as an equal participant in the aid program would be found acceptable when assessed by the *Clark* methodology.

185. 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

186. Id. at 2147.

187. Id. at 2147-48.

188. Id. at 2148.

189. Id.

190. Allowing the religious use would not constitute competitive aid to religion because all similar meeting activities, religious and nonreligious, would receive the same level of aid. This would be a case analogous to fire and police protection for all property owners including churches. The school board's position in this case was analogous to withholding fire and police protection from church property because of misguided concerns about the Establishment Clause.

191. *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 417 (1995), presents essentially the same set of interrelated issues.

V. CONCLUSION

It would seem that the development of what might be called a workable inadvertence jurisprudence for the religion clauses of the First Amendment is long overdue. Although the Court has come to perceive the difference between a deliberate impact on religion and an inadvertent effect on religion in the contexts of both the Free Exercise Clause and the Establishment Clause, the Court has made little progress beyond that most basic insight.

In the free exercise clause context, the Court for many years has been engaged in a kind of wandering in the doctrinal wilderness, unable to bring itself to ask the appropriate next question: "Is the inadvertent restriction on religion too much?" Because the Court was unwilling even to ask the question, it provided no articulated methodology for answering the question. Must we assess the importance of the state's nonreligious regulatory objectives? Should we consider alternative regulatory schemes available to the state at less cost to religious freedom? How should we assess the cost to religious freedom? How should we assess the importance of the particular religious practice to the individual practitioner? Should we assess the importance of the religious exercise from the point of view of organized religious doctrine or in terms of the subjective beliefs of the individual practitioner?

The failure to provide a consistent doctrinal framework within which to address these questions in the free exercise context has made it easy to discredit all of the Court's efforts since *Sherbert*. The predictable consequence of this, unfortunately, is a complete rejection of all efforts to protect minority religions from heavy-handed, though accidental, regulatory restrictions. That, for the time being, is where *Smith* seems to have left us.[192]

In the establishment clause context, the Court has moved on to ask, in the confused rhetoric of the *Lemon* test, the appropriate next question: "Is the inadvertent aid to or endorsement of religion too much?" But the Court has provided nearly no guidance at all on how to approach that question. Too much by what standard? Should aid or endorsement be assessed from some sort of objective economic point of view or should it be assessed from the subjective viewpoint of

192. Justice Souter, concurring in *Hialeah*, expresses "doubts about whether the *Smith* rule merits adherence" and argues forcefully that "the Court should re-examine the rule *Smith* declared." *Hialeah*, 113 S. Ct. at 2240 (Souter, J., concurring). See also note 56 suggesting that the Religious Freedom Restoration Act merely reimposes as a statutory matter the inadequate pre-*Smith* free exercise jurisprudence.

a casual citizen observer? Should alternative approaches available to the state be considered?

Here too it has been easy to discredit the work of the Court. Numerous critics, both on and off the Court, have pointed to the plasticity of the *Lemon* "test" and the consequent inconsistencies in the results of its application.[193] Without a conceptual framework to guide and confine the weighing or balancing required in each case, incoherence and inconsistency inevitably result. Unfortunately, in apparently rejecting the *Lemon* rhetoric without articulating a substitute, the Court has moved establishment clause jurisprudence further in the direction of unrestrained, ad hoc decision-making—not exactly what one would view as doctrinal progress.

This Article has argued forcefully that the problem of inadvertence in the context of the religion clauses is structurally or conceptually identical to the problem of inadvertence in the free speech context. Thus, the *Clark* approach to inadvertent interferences with speech should be utilized to guide and confine the balancing required in inadvertence cases in the religion clause context.

The questions posed by the use of a *Clark* analysis in the context of the two religion clauses are not easy questions. Perhaps an intuitive awareness of their difficulty has prevented the Court for over 200 years from developing a coherent jurisprudence for the inadvertence problem presented by the religion clauses of the First Amendment. Surely, however, a serious attempt to articulate and then address these questions would hold more promise and less frustration than attempting to apply the Court's current doctrinal jumble to case after case.

193. See, for example, Jeffrey S. Theur, Comment, *The* Lemon *Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 Ky. L. J. 1061, 1061-75 (1987-88) (arguing that some elements of the *Lemon* test lead to inconsistent judicial results, and should be abandoned); Stuart W. Bowen, Jr., Comment, *Is* Lemon *a Lemon?: Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 St. Mary's L. J. 129, 155-59 (1990) (arguing that the *Lemon* test is inherently weak and should be reformulated). See also note 61.