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I. INTRODUCTION

According to Justice Powell, the first amendment religion clauses are the source of "some of the most perplexing questions" that the Supreme Court confronts.[1] In a long and rapidly expanding line of religion clause cases the Court has struggled, with a conspicuous lack of success, to articulate principles of broad appli-

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1. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

cability. The Court's efforts to date have resulted in a jumble of tests, standards, and theoretical approaches from which predicting the outcome in future cases is very difficult.

The conceptual problems that have frustrated the Court's attempts at doctrinal development center in two broad areas: first, the meaning and effect of the establishment clause and second, the relationship between the establishment clause and the free exercise clause. In a third area, the meaning and effect of the free exercise clause, the Court has had somewhat less trouble articulating a doctrinal approach, but even here the Court has not applied the doctrine consistently and has not reached entirely predictable results.

Perhaps the most telling measure of the Court's doctrinal frustration in the religion clause area is the extent to which it recently has attempted to elevate its conspicuous lack of doctrinal consistency into an accepted methodology for decisionmaking. Chief Justice Burger summarized current thinking on the relationship between the two religion clauses by noting that there is "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."[2] Finding a clearer acknowledgement of the Court's failure to articulate a unifying theory underlying the two clauses would be difficult. Concerning the meaning and effect of the establishment clause, Chief Justice Burger has observed with apparent approval (or at least resignation) that the Court has been unwilling to tie establishment clause analysis to a single test.[3] With the same apparent approval, Justice White has noted that "our decisions have tended to avoid categorical imperatives and absolutist approaches . . . . This course sacrifices clarity and predictability for flexibility . . . ."[4] Describing the same phenomenon in another case, Justice O'Connor concluded that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[5] In effect, the Court seems to have accepted the inevitability of an ad hoc approach with a final result in any

2. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

3. Lynch v. Donnally, 465 U.S. 668, 678 (1984).

4. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980); *see* Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* Court explained, "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." *Id.* at 612.

5. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). In his dissent in Lynch v. Donnally, Justice Brennan characterized the Court's doctrinal approach somewhat less charitably: "It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results." *Id.* at 699 n.4 (Brennan, J., dissenting).

case possible only after Supreme Court review.

Perhaps the best that can be said for the Court's efforts over the years is that the Court has achieved some groping, intuitive consistency in results despite the inconsistencies both in the articulated rationales and in the application of those rationales. Because none of the articulated reasoning provides a firm theoretical basis for all or even most of the decisions, the explanation for any rough consistency must lie in intuitive policy concerns that are only hinted at in the Court's various opinions. Chief Justice Burger came close to this insight when he wrote that the purpose of the religion clauses was "to state an objective, not to write a statute."[6] The Court, however, has never authoritatively identified the objective the religion clauses were intended to state. The identification of a single overriding objective for the two clauses would provide the unifying theory required to assign consistent and coherent content to the two religion clauses and to dissolve the "tension" between the clauses. The thesis of this Article is that such a single overriding objective can be identified and articulated. This objective reflects the basic purpose of those who authored and adopted the religion clauses and, to a remarkable degree, harmonizes the Court's apparently disparate results in religion clause cases. The Court's conscious acceptance of the unifying theory proposed in this Article would provide a satisfying explanation for a large number of results arrived at by intuition in the past and would provide a theoretical basis from which to predict results in future cases.

II. Current Religion Clause Doctrine and the Suggested Unifying Theory

The highest level of doctrinal consistency is found in "pure" free exercise cases—those cases involving a challenge to a direct regulatory interference with recognized religious activity. Such legislative actions invariably call forth the strictest judicial scrutiny,

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6. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). The Court explained:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Id.

usually referred to as the compelling interest test.[7] As the governmental interference with religion becomes less direct or more inadvertent, however, the Court applies a reduced level of judicial scrutiny through a variety of rhetorical constructs.[8] Similarly, as the regulated activity either becomes less central to religious observance or is identified with less well-recognized religions, the Court reduces the level of judicial scrutiny through a number of rhetorical or doctrinal formulae.[9]

On the establishment clause side of the ledger, the Court's working doctrines are much less clear and consistent. The Court most often articulates as the criterion the tripartite test set forth in *Walz v. Tax Commission of the City of New York*.[10] Under the *Walz* test, the Court evaluates a governmental action for purpose, primary effect, and excessive entanglement.[11] This tripartite test is far less rigorous in both articulation and application than the strict judicial scrutiny the Court applies in the usual free exercise case, but the Court never has provided a clear explanation for that significant doctrinal difference. Although the Court recites the tripartite test formula regularly, it seems to apply the formula inconsistently. As if the tripartite test were not flexible and amorphous enough in itself, the Court occasionally articulates some different test or no test at all to dispose of an establishment clause case.[12] Finally, the Court seems to have accepted the notion that there should be some sort of historic exception to what would otherwise be a finding of unconstitutionality under the usual establishment clause criteria.[13]

At the level of the doctrine articulated in these cases, the Court's various approaches and results are impossible to reconcile.

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7. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Wooley v. Maynard, 430 U.S. 705 (1977); Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940). Although the applications of the compelling interest test seem inconsistent, the language does not vary significantly. *See infra* text accompanying notes 25-44.

8. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

9. *See* United States v. Lee, 455 U.S. 252 (1982).

10. 397 U.S. 664 (1970).

11. The Court in Lemon v. Kurtzman stated what is known as the *Walz* test as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must he one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. 602, 612-13 (1971) (citations omitted).

12. *E.g.*, Larson v. Valente, 456 U.S. 228 (1982). In *Larson* the Court applied strict scrutiny in disposing of an establishment clause claim. See *infra* text accompanying notes 63-73 for a discussion of *Larson*.

13. Marsh v. Chambers, 463 U.S. 783 (1983).

As noted above, many members of the Court have acknowledged as much. According to this Article, however, the various results reached by the Court while using a variety of doctrinal approaches are explainable in terms of a single unarticulated objective that has guided the Court's actions in this area. Simply stated, the Court's objective is to prevent or minimize political oppression of groups defined by religious belief or conduct. In other words, whether the case involves a free exercise challenge or an establishment challenge, the level of judicial intervention that results will be in direct proportion to the risk of political oppression along religious lines. When that risk is slight or nonexistent, judicial intervention will be casual or nonexistent, no matter which of the many doctrinal constructs the Court chooses to articulate as the applicable standard or test in the case. On the other hand, when the potential for political oppression along religious lines is great, the Court usually will articulate and always will apply the strictest judicial scrutiny, no matter which of the two clauses provides the source of the challenge.

The Supreme Court's application of strict scrutiny to free exercise cases but not to establishment cases is explained by the simple fact that free exercise cases more often present a greater threat of political oppression of religion. A direct regulatory assault on religious liberties constitutes the most serious and obvious political oppression of religion. On the other hand, governmental "establishment" of some politically preferred religion by affording it governmental aid presents a noticeably less serious and less direct threat of political oppression of the disfavored religions. The oppression present in this situation is not a direct interference with the freedom to believe or act; the disparate treatment creates only a burden of operating without the governmental aid available to a competing religious belief. While such a competitive political disadvantage may be undesirable, the risk of oppression is usually remote compared to that involved in an immediate regulatory interference with religious freedom.

From this perspective, the "tension" between the religion clauses dissolves, and the Court's decisions in "tension" cases become perfectly understandable. Generally speaking, these cases present a situation with only two courses of action available to the state. The first course of action would restrict or burden some religious belief or action. The other course would appear to aid, at least indirectly, the religious belief or conduct in question. When confronted with this choice, the Court routinely holds that the free

exercise clause requires the second course of action even though that course otherwise appears to violate the establishment clause.[14] In view of the Court's determinative, albeit intuitive, concern for the risk of political oppression of religion, this result is perfectly predictable. Because a regulatory burden or restriction on religious exercise presents a greater or more direct risk of political oppression than does governmental aid to religious exercise, the single objective of the two religion clauses requires the choice of the aid alternative.[15]

Finally, this process of weighing the risk of political oppression on a case-by-case basis explains why the Court occasionally has invoked a type of historic exception to what otherwise would have been the applicable free exercise or establishment clause criteria. In these cases, the Court confronted a challenge to governmental action that had stood without serious question for many years, in some instances dating back to the time of the adoption of the Bill of Rights. While these governmental actions technically did advance or restrict religion, the Court refused to strike them down because they resulted in no serious risk of political oppression in actual effect. The results in these cases are simply not understandable in terms of the Court's articulated criteria in prior cases. For example, it seems virtually impossible to find that the use of a minister to open state legislative sessions with prayer does not violate the establishment clause under the *Walz* tripartite test of purpose, primary effect, and excessive entanglement.[16] When the Court insists on holding that such a practice does not violate the establishment clause because of some historic exception, the Court must be saying that, as a matter of historic experience, this particular practice has not led to political oppression on religious

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14. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

15. In *Walz* the Court faced the choice of restraining religion through taxation or aiding religion through a tax exemption. Resolving the conflict in favor of an exemption, the Court explained:

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.

397 U.S. at 674-75; *see* Wallace v. Jaffree, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring).

16. *See* Marsh v. Chambers, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting).

grounds.

The Court's occasional reviews of the history of the first amendment confirm that the religion clauses are simply two sides of the same conceptual coin and that the core concept is protection against religious oppression by government. In *Everson v. Board of Education*[17] Justice Black observed that both Jefferson and Madison pressed for the passage of the two religion clauses of the first amendment in order to protect individual religious liberty.[18] Establishment of an official religion by government was simply one particularly common form of interference with individual religious liberty.[19] Stated another way, any governmental interference with religion necessarily would involve at least an implicit approval or establishment of other beliefs or practices considered acceptable.[20] As Justice Black concluded after his review of the history of the religion clauses, the framers decided that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious indi-

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17. 330 U.S. 1 (1947).

18. *Id.* at 13.

19. *See generally* L. PFEFFER, CHURCH, STATE AND FREEDOM (1953). Mr. Pfeffer has noted:

> The draftsmen of the First Amendment regarded freedom of religion as incompatible with an establishment. Nothing in American constitutional history or tradition justifies an apportionment of values between disestablishment and freedom or indeed the dichotomy itself. The struggle for religious liberty and for disestablishment were parts of the same single evolutionary process that culminated in the First Amendment.

Id. at 122.

20. Professor Tribe noted the fundamental interrelationship between the religion clauses, although, like the Court, he stopped short of identifying the single underlying purpose of the two clauses:

> Allocating religious choices to the unfettered consciences of individuals under the the free exercise clause remains, in part, a means of assuring that church and state do not unite to create the many dangers and divisions often implicit in such an established union. Similarly, forbidding the excessive identification of church and state through the establishment clause remains, in part, a means of assuring that government does not excessively intrude upon religious liberty.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 814-15 (1978) (footnotes omitted).

The second sentence of Tribe's parallel construction identifies the protection of religious liberty, which is the primary purpose of the free exercise clause, as one purpose of the establishment clause. To complete what appears to be a clever parallel, he observes in his first sentence that one purpose of the free exercise clause is to prevent "the many dangers" of establishment, which he obviously suggests is the primary purpose of the establishment clause. But what exactly are "the many danagers" of establishment? This Article argues that Tribe's "many dangers" are no more and no less than a variety of threats to religious liberty. Upon close inspection, Professor Tribe's suggestion of complimentary purposes for the religion clauses collapses into the more fundamental observation that the two religion clauses share precisely the same objective: preventing political oppression on religious lines.

vidual or group."[21] In his dissent in *Everson* Justice Rutledge also articulated the tie between the establishment clause ban on aid of religion and the concern for religious liberty. According to Justice Rutledge's analysis, public financing of religious activity would lead to competition for more public support. This political competition among religions would produce a politically dominant religion and the end of religious freedom—precisely what the establishment clause was designed to prevent.[22]

More recently, Justice O'Connor made the same basic point in her concurring opinion in *Wallace v. Jaffree*, stating, "Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty."[23] Referring specifically to the establishment clause, Justice O'Connor stated, "The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment."[24]

In effect, the free exercise clause and the establishment clause should be read and applied as a single conceptual unit, a single constitutional restriction on government. When the Court's deci-

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21. *Everson*, 330 U.S. at 11. In discussing the establishment clause specifically, Justice Black observed:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). The prohibitions against government setting up a church, aiding one or all religions, or preferring one religion over another are all purposes that traditionally are ascribed to the establishment clause. The other purposes noted by Black, such as preventing government from forcing or barring attendance at church and preventing government from forcing or punishing the profession of particular religious beliefs, are purposes traditionally ascribed to the free exercise clause. Yet Justice Black casually lumped them all together as purposes of the establishment clause, apparently confusing the separate doctrinal contents that the Court has assigned to each clause. Of course, Justice Black actually was acknowledging, consciously or unconsciously, that the single purpose of the two clauses was the prevention of political oppression along religious lines.

22. 330 U.S. at 53 (Rutledge, J., dissenting).

23. 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring).

24. *Id.* at 2497 (O'Connor, J., concurring).

sions are analyzed from the perspective of a single "religion clause" ban on excessive risk of political oppression, the intricate doctrinal distinctions and apparent doctrinal inconsistencies largely fade away.

III. The Usual Regulatory Infringement of Religious Liberty: The Greatest Risk of Political Oppression

The direct prohibition of a religious exercise because the government simply prefers or approves of a competing religious belief is extremely rare in this country. Regulation of religious belief as a matter of official religious preference would be a per se violation of the free exercise clause[25] because political oppression of religion would not be just a risk but an absolute certainty. This kind of regulation would be precisely the sort of political oppression of religion for religious reasons that the framers specifically intended the religion clauses to prevent. In a sense, such a regulation would trigger the highest possible level of judicial scrutiny—a holding of per se unconstitutionality. Indeed, the regulation also would be the clearest sort of establishment clause violation, thus demonstrating the two clauses' underlying unity of purpose. Similarly, formal governmental endorsement of a particular religious belief or practice is fairly rare. Official endorsement of one religion, even without direct regulatory interference with competing religious beliefs, would be a per se violation of the establishment clause.[26]

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25. Cantwell v. Connecticut, 310 U.S. 296 (1940).

26. Although such cases are not common, it appears that the 1984-85 Term produced two decisions that arguably fit this category. In Wallace v. Jaffree, a majority of the Court held as a factual matter that the Alabama legislature enacted the challenged statute "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." 105 S. Ct. 2479, 2492 (1985). That finding of fact, vigorously disputed in the dissents, led immediately to the conclusion that the statute contravened the establishment clause.

In the second case, Thornton v. Caldor, Inc., the Court faced an establishment clause challenge to a Connecticut statute requiring all employers to allow each employee to refuse to work on the day designated by the employee as his or her religious Sabbath. 105 S. Ct. 2914 (1985). The Court described the statute as a state command "that Sabbath religious concerns automatically control over all secular interests at the workplace." *Id.* at 2918. Curiously, the Court articulated its establisbment clause objections in terms of the "primary effect" of the statute rather than in terms of the obvious purpose of the statute to advance the religious practice of Sabbath observance. *Id.* Nonetheless, the general thrust of the unusually brief opinion, joined by an overwhelming majority of the Justices, seems to be a finding of per se unconstitutionality on the grounds that the State's regulatory power was used purposefully to advance particular religious interests over all competing interests. For other examples of cases involving state actions purposefully designed to advance particular religious beliefs or practices, see Stone v. Graham, 449 U.S. 39 (1980) (posting of copies of

The free exercise cases that actually reach the Court almost always result from some governmental regulation intended to accomplish a secular purpose like public health, public order, or the distribution of economic benefits. The interference with religion is inadvertent or unintentional and occurs only because the regulated conduct is in some instances religiously motivated.[27] Similarly, the establishment cases that reach the Court usually result from a governmental program intended to advance a secular objective such as education. Any assistance that some religion receives from the program is the unintentional or inadvertent by-product of the government's attempt to advance its nonreligious objectives. The way the Court approaches an inadvertent aid case, however, differs fundamentally from the way it approaches an inadvertent regulation case. Generally speaking, a demonstration of secular purpose and secular effect will save from establishment clause invalidity a governmental program that results in inadvertent aid to religion.[28] On the other hand, such a showing will not save from free exercise clause challenge a governmental regulation that inadvertently restricts the exercise of religious beliefs. For the regulation to survive free exercise challenge, the government must show that the regulation is the least restrictive means available to pursue a compelling governmental purpose.[29] As a practical matter then, the Court reserves the highest level of judicial scrutiny for direct regulatory interferences with religiously motivated conduct. These cases trigger the highest level of judicial scrutiny or demand the highest level of justification from the state precisely because, aside from per se violations, these regulations present the greatest risk of political oppression of religion.

The Court's analytical standard and its ultimate holding in *Wisconsin v. Yoder*[30] exemplify the rigor with which the Court will protect a religious minority against inadvertent state regulatory interference. *Yoder* concerned a challenge to Wisconsin's compulsory school attendance law that required children to attend public or

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the Ten Commandments in public school classrooms), and Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition against teaching evolution in the public schools).

27. Such free exercise cases are inevitable in modern society. In Braunfeld v. Brown the Court explained, "[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." 366 U.S. 599, 606 (1961).

28. *See infra* text accompanying notes 45-60.

29. *See supra* note 7 and accompanying text.

30. 406 U.S. 205 (1972).

private school until they reached age sixteen. Amish religious beliefs required that formal education stop after the eighth grade to avoid excessive exposure to worldly influences. Justice Burger's opinion in *Yoder* flatly states, "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[31] Because the state could not meet this heavy standard of justification, the Court held that the application of the state's compulsory education law to Amish children violated the free exercise clause.[32]

Perhaps the most graphic demonstration of the Court's underlying concern about political oppression of religious minorities is found in *Sherbert v. Verner*,[33] which the Court recently reaffirmed in *Thomas v. Review Board*.[34] The *Sherbert* case varied significantly from the usual case of inadvertent regulatory interference with religiously motivated conduct. In *Sherbert* the plaintiff had lost her job, and she refused to accept available employment that would require work on Saturdays in violation of her religious beliefs. The state employment security commission denied her request for unemployment compensation because of her refusal to accept the available employment that entailed Saturday work. In a part of the decision with potential implications far beyond the religion clauses, the Court first held that withholding a state benefit because of religiously motivated conduct imposed a penalty on the religious conduct that was the conceptual equivalent of a regulatory fine.[35] The Court then held that the penalty violated the free exercise clause because the state could not meet the heavy burden of justification usually imposed in regulatory interference cases such as *Yoder*.[36]

From a political oppression point of view, the result in *Sherbert* is particularly interesting because the state interference with religion was doubly inadvertent. First, the challenged state action

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31. *Id.* at 215.

32. *Id.* at 234; *accord* Wooley v. Maynard, 430 U.S. 705 (1977). For a case in which the Court held that the government's interest met the high standard of justification required for a direct regulatory interference with religiously motivated conduct, see Gillette v. United States, 401 U.S. 437 (1971). In *Gillette* the Court held that the federal government's interest in raising and fielding an army justified forcing draftees to serve in spite of their religious objections to participation in the Vietnam War. *Id.* at 461-62.

33. 374 U.S. 398 (1963).

34. 450 U.S. 707 (1981).

35. 374 U.S. at 404.

36. *Id.* at 409.

was a financial aid program that only inadvertently produced a regulatory impact. Only through the Court's penalty analysis does the withholding of a benefit produce an interference with freedom that is equivalent to the fine that usually accompanies a direct regulatory interference with freedom. Second, the regulation only inadvertently affected religion. The "regulation" was apparently the legislature's good faith attempt to distribute the state benefits to those truly in need, excluding those who merely chose not to work. The only impact on religious liberty occurred because the plaintiff's refusal of employment in this case happened to be religiously motivated. Nonetheless, the Court applied the highest level of judicial scrutiny, or the strongest standard of justification, in striking down the state's restriction on unemployment compensation as a violation of the free exercise clause.

The lesson of *Sherbert* seems to be that the Court can find a significant threat of political oppression of religious minorities in the very inadvertence of the state legislatures. The Court is aware, at least intuitively, that the state legislature never would have imposed the regulation in cases like *Yoder*, or the qualification on benefits in cases like *Sherbert*, if the legislature had been controlled by members of the objecting religious minority. Thus, in a very real way the legislature's insensitivity to or disregard of a minority's religious beliefs constitutes the regulatory imposition of the majority's religious beliefs on the minority. The regulation or the qualification of benefits unavoidably incorporates an implicit religious value judgment and implements the majority's religious beliefs.[37]

On the other hand, the Court does not always perceive a serious threat of political oppression in the inadvertence of the legislature when, rather than prohibiting the religiously motivated conduct, the legislature simply has made it more difficult, more costly, or less convenient. In recent cases similar to *Sherbert* the Court had claimed to be applying strict scrutiny to the burden imposed on religious conduct, but has found that state justifications that do not seem compelling in the usual strict sense have been sufficient. For example, *Bob Jones University v. United States*[38] concerned a free exercise challenge to an Internal Revenue Service policy that denied otherwise available tax benefits to any private school that

37. *See* Pepper, *'Quaring' May Help the Supreme Court Clarify Religious Freedom Doctrine*, NAT'L L.J., Apr. 8, 1985, at 24, Col. 1.

38. 461 U.S. 574 (1983).

engaged in racial discrimination. Because sincere religious belief dictated Bob Jones University's discriminatory actions, the Supreme Court announced that the penalty imposed on those actions by the withdrawal of tax benefits would be subject to the compelling interest test. The Court then found that the federal government's compelling interest in eliminating racial discrimination in education justified burdening Bob Jones University's religious freedom.[39] If the challenged federal action had been a direct regulation flatly prohibiting Bob Jones University from engaging in religiously motivated racial discrimination, the Court might well have found the government's interest somewhat less compelling. The ease with which the Court found the government's interest to be "compelling" probably rests partially on the fact that the challenged governmental action left the University entirely free to exercise its religious preference for racial discrimination as long as the University was willing to forfeit the tax benefit in question.

Similarly, in *United States v. Lee*[40] the Court found that the imposition of a social security tax on Amish employers was justified by a governmental interest strong enough to outweigh a religious ban on the payment of such taxes. A close reading of the Court's opinion in *Lee* confirms the impression that the Court used some standard of review less rigorous than the compelling interest test. The opinion also indicates that at least one reason for less rigorous scrutiny is that the challenged governmental action did not completely prohibit the Amish from implementing this particular religious belief. After citing *Wisconsin v. Yoder* and *Sherbert v. Verner* for the proposition that the government "may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest,"[41] the Court concluded that the government's interest in this case was "very high."[42] Conspicuously missing from the opinion was any mention of a "compelling" governmental interest. Rather, the general drift of the opinion seemed to emphasize the implication of the word "overriding" that the government's interest should be balanced against the extent of the interference with religious freedom. In view of the Court's conspicious avoidance of the absolutist "compelling interest" language in favor of the more relativist "overriding interest" formulation and the ease with which the Court found

39. *Id.* at 604.
40. 455 U.S. 252 (1982).
41. *Id.* at 257-58.
42. *Id.* at 259.

that standard met, the Court seemingly imposed something less than the strictest review.

The explanation for this somewhat reduced scrutiny can be found at least partially in the Court's observation that the imposition of the social security tax was not a direct total prohibition on the exercise of the religious ban against paying the tax. According to the Court's analysis, the Amish employers had entered into commercial activity and thus had incurred social security tax liability "as a matter of choice."[43] If the Amish employers wished to exercise their religious preference to avoid these taxes, they could do so simply by forfeiting the economic gain derived from the particular forms of commercial activity that gave rise to the tax liability.[44]

IV. THE USUAL NONDISCRIMINATORY GOVERNMENTAL AID TO RELIGION CASE: A LESSER RISK OF POLITICAL OPPRESSION

According to current doctrine that distinguishes between the two religion clauses, governmental benefits to religion are subject to challenge under the establishment clause. The Court routinely invokes the tripartite test set out in *Walz v. Tax Commission of the City of New York*[45] as the standard of review to evaluate the constitutionality of governmental aid to religion. The 1980 case of *Committee for Public Education and Religious Liberty v. Regan*,[46] which set the stage for the Court's most recent encounters with governmental schemes benefiting religion,[47] provides a typical example of the *Walz* tripartite test in operation. In *Regan* the Court

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43. *Id.* at 261.

44. The Court has indicated recently that a lower scrutiny than the compelling interest test may he applied even in cases of inadvertent direct regulatory interference with religious conduct if the regulation merely makes the conduct more difficult or less convenient, but does not prohibit it altogether. For example, in Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981), the Court confronted a state regulation prohibiting anyone from engaging in solicitation at the state fair outside of properly desiguated fixed locations. Because the Krishna religion requires solicitation in public places, the Krishnas challenged the regulation confining their activities to fixed locations at the fair as a violation of the free exercise clause. Recoguizing that the solicitation was "protected by the First Amendment," *id.* at 647, the Court analogized the regulation to a "time, place, and manner" restriction on free speech. According to the Court, those restrictions are constitutionally valid providing "that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Id.* at 648.

45. 397 U.S. 664 (1970).

46. 444 U.S. 646 (1980).

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

upheld a New York statute that allowed state funds to be used to reimburse both secular and sectarian private schools for the costs of state-required testing and reporting services.[48]

First, the Court found that the New York statute was intended to serve the secular purpose of enhancing educational opportunity.[49] The Court found no indication that the legislature intended the statute to advance either the interests of one religion over another or the interest of religion over nonreligion. Second, the Court held that the primary actual effect of the statute was not the advancement of religion.[50] The Court found no significant risk that the state-supported examinations could be used for religious indoctrination.[51] Third, the statute did not involve the state in excessive entanglement with religion or religious activities. The statute's monitoring system did not require daily surveillance or intrusive inspections of the religious schools by state officers. Because the financial arrangements were discrete and identifiable, entanglement was minimal.[52]

The first step in the tripartite analysis, checking for a secular legislative purpose, simply weeds out those relatively few cases that involve a per se violation of the establishment clause.[53] As noted above, any state program that was intended specifically to advance either one religion over another or religion over nonreligion would constitute a per se violation.[54] Not surprisingly, these cases are relatively rare. The usual case reaching the Court involves a program with an obvious secular purpose (such as the

48. 444 U.S. at 648.

49. *Id.* at 654.

50. *Id.* at 657.

51. *Id.* at 656. The Court held that there was no constitutionally significant distinction between paying public employees or independent workers to grade standardized tests and paying a private school to have its teachers do the same thing. This outcome would change if the legislation did not adequately prevent misuse of reimbursements, but the challenged statute had sufficient protection.

52. *Id.* at 659-60. In his dissent Justice Blackmun applied the tripartite test and concluded that the New York statute had the primary effect of advancing religion and created excessive entanglement. *Id.* at 670 (Blackmun, J., dissenting). This difference in application is not as significant as the recognition that the tripartite test governed the disposition of the case. Eight members of the Court agreed that the tripartite test was appropriate to define the contours of permissible nondiscriminatory aid to religious organizations. Mr. Justice Stevens dissented and advocated the return of an impregnable wall between church and state. *Id.* at 671 (Stevens, J., dissenting). He suggested that there was no consistent rationale underlying the school cases, and he summarily concluded that the challenged subsidies violated the establishment clause. *Id.*

53. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2500 (1985) (O'Connor, J., concurring).

54. *See supra* text accompanying note 26.

standardization of educational programs) and an inadvertent benefit to religion (such as paying the cost of an educational program that the religious schools otherwise would fund on their own). Thus, for all practical purposes, the second and third steps in the *Walz* analysis effectively embody the standard of judicial review applicable to state programs that inadvertently aid religion.[55]

A close analysis of the second and third *Walz* factors and the way the Court applies them in cases like *Regan* confirms that the operative factor in these state aid to religion cases is the Court's concern about the level of risk of political oppression along religious lines. The *Walz* second and third factors taken together serve the same function in establishment clause analysis that the compelling interest test serves in free exercise clause analysis. The "bipartite" *Walz* test, however, imposes far less rigorous judicial scrutiny than that applied under the compelling interest rhetoric in the usual free exercise case. This difference in the level of judicial scrutiny exists because state programs that inadvertently aid religion generally present a much lower risk of political oppression than regulatory interferences with religious conduct.

Furthermore, it seems more than coincidence that in scrutinizing the primary effect of a state scheme pursuant to the second element of the *Walz* test, the Court most often seems concerned about the possibility that a religious institution will divert state aid to support religious indoctrination.[56] Of all the religious activities that a state might inadvertently aid, religious indoctrination involves the greatest likelihood of religious oppression. In a sense, even the recipients of state-aided religious indoctrination are

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55. *But see* Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985) (discussed *supra* note 26). In that case the Court found a violation of the establishment clause in the "primary effect" of advancing a particular religious practice rather than in the single and obvious purpose of the legislature to produce that effect.

56. *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

There is a catch-22 between aid and supervision. Too little state supervision of religious schools' use of public support may cause a program to fail the primary effect test. Enough supervision to insure a secular primary effect may cause a program to fail the excessive entanglement test. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *See* Meek v. Pittenger, 421 U.S. 349 (1975). The amount of supervision needed to insure no indoctrination may vary with the age of students. *Compare* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking state aid to nonpublic elementary and secondary schools) *with* Tilton v. Richardson, 403 U.S. 672, 685-86 (1971) (upholding congressional program to aid colleges and universities) ("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.").

themselves the victims of politically imposed religion. More importantly, the process of vigorous indoctrination ultimately is responsible for expanding the numbers of any religious group and thereby enhancing the social and political influence of that particular religion. Thus, while the *Walz* test is less rigorous than the usual free exercise test because of the lessened risk of political oppression in a *Walz* case, the primary effect element of the *Walz* test is most vigorous in those *Walz* cases when the risk of political oppression is greatest.

Finally, the remaining element of the *Walz* test, the requirement that any state aid scheme avoid "excessive entanglement," embodies the same underlying concern about political oppression. Although the entanglement rhetoric has appeared lately in a variety of contexts and seems to change meaning with the context, the notion of entanglement in state aid cases seems to refer primarily to the state's efforts to enforce the conditions and qualifications that accompany the usual grant of aid. The Court to some extent may be concerned about the simple association between state enforcement personnel and the religious institution whose actions are being monitored.[57] More likely, the central concern expressed in the entanglement language relates to the regulatory effect of the conditions the state attaches to the aid and to the regulatory effect of the state's efforts to enforce those conditions.[58] In *Sherbert v. Verner*[59] the Court clearly ruled that conditioning the receipt of state aid on the recipient's modification of her religiously motivated conduct constituted a regulatory interference with religious liberty and called forth the strictest judicial scrutiny.[60] Not surprisingly then, state regulatory involvement that accompanies state aid to religion calls forth the most vigorous judicial intervention available in a state aid case under the *Walz* doctrine of entanglement.

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57. *See Aguilar* 105 S. Ct. at 3239.

58. In the Court's most recent encounter with the entanglement problem, the Court stated:

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious signficiance, the freedom of religious belief of those who are not adherents of that denomination suffers . . . . In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

Id. at 3237.

59. 374 U.S. 398 (1963).

60. *See supra* text accompanying notes 33-37.

The net effect of the *Walz* test, both as articulated and as applied, is to strike down state aid programs when they present a significant risk of political oppression on religious lines while preserving those aid programs that do not present this risk.

V. The Religious Discrimination Case: A Greater Risk of Political Oppression

A. Discriminatory Infringement of Religious Liberty

As noted earlier, a regulatory interference with religiously motivated conduct calls forth the most vigorous judicial scrutiny because regulatory restrictions on religious freedom pose the most direct threat of political oppression of religion.[61] A regulatory measure that discriminates between religions would seem to present an even greater risk of political oppression than that presented by an evenhanded regulation.[62] Thus, an assessment of the risk of political oppression would lead one to predict that a discriminatory interference with religiously motivated conduct would receive the strictest possible judicial scrutiny no matter what doctrinal construct the court might choose to articulate. The Court's response to the problem presented in *Larson v. Valente*[63] confirms the accuracy of this prediction.

In *Larson* the Court confronted a Minnesota regulation intended to protect the public from fraudulent solicitation of charitable contributions. The state required charitable organizations covered by the act to register with the Minnesota Department of Commerce prior to soliciting contributions[64] and to file extensive reports of financial operations.[65] Prior to 1978, the state exempted all religious organizations from the registration and reporting requirements.[66] Under a 1978 amendment, the state restricted the exemption for religious organizations to those organizations that received more than half their total revenues from members or affil-

61. *See supra* text accompanying notes 27-29.

62. See *supra* text accompanying note 37, which suggests that all regulatory measures that impact on religion are "discriminatory" in that the measure would never have been passed if the impacted religious minority had been a political majority. If the Court finds, as it did in *Sherbert*, a serious risk of political oppression in inadvertent discrimination, it follows that overt discrimination would raise a greater risk of political oppression of a religious minority.

63. 456 U.S. 228 (1982).

64. *Id.* at 231.

65. *Id.*

66. *Id.*

iated organizations.[67] Members of the Holy Spirit Association for the Unification of World Christianity (Unification Church) challenged the fifty percent rule as a violation of the Constitution.[68] Applying strict scrutiny to the Minnesota act, the majority held that the act must be justified by a compelling state interest and must be closely fitted to advance that interest.[69] The Court assumed, *arguendo*, that prevention of fraud was an adequately compelling state interest,[70] but Justice Brennan's opinion concluded that the fifty percent rule was not fitted closely enough to the asserted interest.[71] Thus, the act failed the second prong of the strict scrutiny standard, and the Court held that the fifty percent distinction was unconstitutional.

Most notable about the *Larson* case is the doctrinal construct the Court used to articulate its result. In effect, the Court said that, for free exercise clause purposes, the state could justify its interference with religious liberty by showing a compelling state interest in preventing fraudulent solicitation. The Court then could have proceeded to question the *inequality* in the regulatory interference as a matter of equal protection. Under the fundamental rights branch of equal protection,[72] the Court would have applied the compelling interest test to the inequality and found that the inequality did not meet the second element of the compelling

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67. *Id.* at 231-32.

68. Plaintiffs claimed that the act "constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws . . . ." *Id.* at 233.

69. *Id.* at 247.

70. *Id.* at 248.

71. *Id.* at 251. The Court rejected the argument that the 50% rule distinguished between religious groups that were able to prevent fraudulent solicitations and religious organizations that were not. The Court also dismissed three premises that supported the state's argument. According to the state's first premise, memhers of groups exempted by the act could and would supervise and control solicitations. Justice Brennan responded by noting both that the record contained no evidence to support the first premise and that the legislative history of the act suggested a contrary conclusion. *Id.* at 249-50. According to the second premise, membership control provided an adequate safeguard against fraudulent practices. Justice Brennan responded, again noting the absence of evidence showing why the line should be drawn at 50% and stating that the act assumed that religious organizations could not prevent fraudulent activities. *Id.* at 250. According to the final premise, the need for disclosure increased with the percentage of nonmember contributions. The Court rejected tbis premise, noting that raw amounts rather than percentages more plausibly governed the state interest in disclosure. The Court suggested that the public has a greater interest in disclosure from a church tbat raises $10 million, 20% of which comes from nonmembers, tban a church tbat raises $50 thousand, 60% of which comes from nonmembers. *Id.* at 251.

72. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942).

interest test for the reasons the Court articulated in the opinion.

Rather than characterize the discrimination in the regulation as an equal protection problem, however, the Court chose to characterize the regulatory discrimination as an establishment clause problem. In effect, the Court assigned an equal protection role to the establishment clause in cases of unequal regulatory interference with religiously motivated conduct.[73] Such a doctrinal construct in itself should not be surprising because the essence of governmental establishment of religion is the discriminatory disfavoring of other religions or of nonreligion. What is particularly telling about the *Larson* construct is that, after assigning the case to the establishment clause, the Court proceeded to apply strict scrutiny with no precedent in establishment clause doctrine. The Court indirectly acknowledged its lack of doctrinal underpinnings when it lamely attempted to draw on elements of the *Walz* tripartite test to justify the holding of the case.[74] Nothing in traditional establishment clause doctrine would have led one to anticipate the application of strict scrutiny in *Larson*. Viewing the religion clauses as a single comprehensive prohibition against any unacceptable risk of political oppression of religion, however, would have led to the prediction that the Court would apply strict scrutiny in *Larson* even if *Larson* were characterized as an establishment clause problem.

B. Discriminatory Aid or Benefit

In the recent case of *Lynch v. Donnelly*[75] the Court upheld the municipal financing and display of a nativity scene. For many years the City of Pawtucket, Rhode Island, in cooperation with its downtown retail merchant's association, created a Christmas display to help celebrate the Christmas holiday season. The display was located in the hub of the business community and was similar to displays in many other communities.[76] The display included:

> many of the figures and decorations traditionally associated with Christmas, including, . . . Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a

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73. For a discussion of the equal protection aspects of the establishment clause, see Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under The Establishment Clause*, 62 NEB. L. REV. 359, 371-72 (1983).

74. 456 U.S. at 251-55.

75. 465 U.S. 668 (1984).

76. *Id.* at 671.

teddy bear, hundreds of colored lights, a large banner that reads "SEASON'S GREETINGS," and the crèche at issue here.[77]

The city owned all the components of the display. The lower courts held that the inclusion of a crèche in the Christmas display violated the establishment clause.[78] The Supreme Court reversed and held that the public display of the crèche was not unconstitutional.[79]

The Court began its analysis by exploring the possibility of an historic exception to the usual tripartite establishment clause analysis.[80] Apparently unable to rest on the historical exception notion, the Court shifted from historical background to analytical background. The Chief Justice noted that the Court has never accepted a rigid, mechanical approach to establishment clause cases.[81] Rather, he noted that the Court favors scrutinizing legislation to determine whether it establishes religion or religious faith.[82] The Court then purported to adopt the *Walz* tripartite test to determine whether the municipal sponsorship of the crèche established religion. In fact, however, no existing standard of review was entirely appropriate. Unlike the apparently evenhanded benefit in *Regan*,[83] the state benefit in *Lynch* discriminated in favor of Christian religions and against all others. Certainly the risk of political

77. *Id.*

78. Donnelly v. Lynch, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982).

79. 465 U.S. at 687. The Court of Appeals for the First Circuit held that the tripartite test did not apply to discrimination cases. Citing Larson v. Valente, 456 U.S. 228 (1982), the court held that discrimination cases should be subjected to strict scrutiny. Donnelly v. Lynch, 691 F.2d 1029, 1034 (1st Cir. 1982). Thus, the First Circuit linked uneven benefit and uneven regulatory interference cases and applied the same test, thereby highlighting the equal protection aspect of the establishment clause. The Supreme Court, in reversing the First Circuit and in applying the tripartite test, rejected this consistent equal protection approach and apparently relied instead on the distinction between regulatory schemes and benefit schemes.

80. The Court noted that the Congress that enacted the first amendment also authorized the use of public funds to pay for legislative chaplains. The Court also noted the long history of official recognition of Thanksgiving, Christmas, and the Jewish Holy Days. In addition, the Court cited as examples of religious accommodation our national motto, "In God we trust," and the language "One nation under God," which is contained in the Pledge of Allegiance to the American Flag. The Court also pointed out that publicly supported art galleries, including the National Gallery in Washington, D.C., display many paintings that contain religious themes or messages. Finally, the Court recognized that its own chamber contained religious symbols. Concluding this historical background, Chief Justice Burger's majority opinion asserted that countless other examples of religious accommodation could be listed. 465 U.S. at 677.

81. *Id.* at 678.

82. *Id.*

83. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

oppression along religious lines is greater in such a case than in a case of benefits equally available to all religions. On the other hand, the risk of oppression in an unequal benefits case does not rise to the level presented by a regulatory impairment of religious freedom challenged under the free exercise clause. Thus, in *Lynch* the Court was left without a readily applicable doctrinal construct.

Without an appropriate doctrinal construct and without an explicit consciousness of the values underlying the previous religion clause decisions, the Court floundered in *Lynch*. To reach the conclusion that the city had a valid secular purpose for the crèche, the Court focused on the crèche's position in the context of the Christmas holiday.[84] The Court evaluated the primary effect element of the test by comparing the instant case to previous cases. The Court listed eight permissible governmental benefits to religion that the Court said were no less significant than the crèche display.[85] Six of the examples were drawn from cases concerning evenhanded benefits to religion. The seventh example was drawn from *Marsh v. Chambers*,[86] which the Court decided on the basis of an historic exception to the otherwise applicable establishment clause tests.[87] Thus, only one of the examples cited was arguably a significant

84. The Court accepted the city's claim that the secular purpose of the display was to recognize the historic origins of the national holiday. The Court noted that the city argued that the display had an exclusively secular purpose. 465 U.S. at 681 n.6. Presumably the city took the position that the display was sponsored exclusively to increase the business in the downtown shopping district. The Court distinguished Stone v. Graham, 449 U.S. 39 (1980), and Abington School Dist. v. Schempp, 374 U.S. 203 (1963), on the ground that the religious accommodation in those cases had no secular purpose. In *Stone* the Court had invalidated the posting of the Ten Commandments on public classroom walls because the posting was purely religious. In *Abington* the Court had invalidated Bible readings in public schools because there was no educational or secular aspect to the readings.

85. 465 U.S. at 681-82. The Court stated that:

> [T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools; expenditure of public funds for transportation of students to church-sponsored schools; federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education; noncategorical grants to church-sponsored colleges and universities; and the tax exemptions for church properties sanctioned in *Walz*. It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland*; the release time program for religious training in *Zorach*; and the legislative prayers upheld in *Marsh*.

Id. (citations and footnotes omitted).

86. 463 U.S. 783 (1983).

87. See *infra* text accompanying notes 94-104 for a discussion of *Marsh* and the historic exception.

unequal benefit that the Court previously had held constitutional.[88] The Court then buttressed this analysis by contrasting two examples of evenhanded benefits previously held invalid.[89] Concluding the tripartite test analysis, the majority found no excessive administrative or political entanglement.[90]

The majority and concurring opinions strove mightily to fit this unequal benefits case to the tripartite test and actually applied the tolerant level of judicial scrutiny usually associated with the tripartite test rhetoric. Justice Brennan in dissent, however, seemed to realize that such a low level of scrutiny was inappropriate. Nonetheless, he too embraced the tripartite test rhetoric without questioning the appropriateness of applying a doctrinal construct drawn from evenhanded benefits cases.[91] Because he sensed the greater risk of political oppression, he applied a stricter tripartite test and was able to find a violation of the establishment clause.[92] Without a unifying theory, however, Justice Brennan was unable to square his analysis adequately with previous cases.

All the opinion writers attempted to use a test designed for cases with a lower level risk of political oppression. This resulted in confusion and dickering about the application of the tripartite test. The Court's approach not only led to a faulty result in the

88. The one arguably appropriate citation is McGowan v. Maryland, 366 U.S. 420 (1961), upholding Sunday closing laws. Because the politically dominante religions consider Sunday their day of worship while several minority religious do not, the Sunday closing laws present the same sort of uneven benefit problem that the municipal crèche in *Lynch* presents. The Court's doctrinal analysis in *McGowan*, however, contains the same flaw that the Court perpetuated in *Lynch*—the failure to note that uneven benefit cases present a risk of political oppression along religious lines that exceeds the risk presented by evenhanded benefit cases. The perspective advanced in this Article clearly demonstrates the inconsistency between the *McGowan* holding and the rest of the Court's holdings on religion clause questions. Thus, the theory of political oppression gives doctrinal form to the intuitive dissatisfaction and critical comment that has attended the *McGowan* decision.

89. 465 U.S. at 682-83.

90. On the excessive entanglement issue, the majority accepted the lower court's conclusion that there was an acceptable lack of contact, sponsorship, and day-to-day interaction. The Court refused to hold that political divisiness alone amounted to excessive entanglement, but concluded that the history of the crèche display failed to indicate political disharmony. *Id.* at 684.

91. *Id.* at 694 (Brennan, J., dissenting).

92. Justice Brennan concluded that there was no secular purpose for including the crèche in the Christmas display. He focused on the crèche rather than the display as a whole. Because the crèche could be separated from the rest of the display with no impairment to the secular purpose, inclusion of the crèche showed approval of the particular religious beliefs symbolized by the crèche and thus violated the purpose element of the tripartite test. Brennan also held that the crèche would result in excessive entanglement because excessive contacts and political divisiveness would result from non-Christian groups petitioning for their share of the government's support. *Id.* at 698-704.

case, but also distorted the tripartite test for future equal benefits cases. Had the Court directly assessed the risk of political oppression along religious lines, it would have realized that judicial scrutiny of discriminatory benefits should be stricter than the scrutiny of nondiscriminatory benefits. A direct assessment of the risk of political oppression of religion in *Lynch* would have dictated a test that is stronger than the test in *Regan*[93] and weaker than the test in *Larson*.[94]

VI. The De Minimis Regulation or Aid Case: An Acceptable Risk of Political Oppression

In *Marsh v. Chambers*[95] the Court clearly established the existence of an historic exception to what otherwise would be applicable religion clause doctrine. *Marsh* concerned a challenge to the practice of the Nebraska legislature of opening each legislative session with a prayer delivered by the state's official chaplain. The chaplain theoretically was selected biannually but the same person had held the position since 1965.[96] The state paid a salary for the chaplain's services. This entire scheme was attacked on establishment clause grounds. The district court had held that the opening prayer was constitutional, but that paying the chaplain from public funds violated the establishment clause.[97] The United States Court of Appeals for the Eighth Circuit held that the entire scheme failed all three elements of the tripartite test.[98] The Supreme Court reversed the Eighth Circuit, holding that Nebraska's policy of paying a chaplain to open legislative sessions with prayer did not violate the establishment clause.

The majority rested its decision on the fact that the risk of offending first amendment interests was de minimis. Justice Burger's majority opinion supported this conclusion with an examination of the unique historical acceptance of legislative prayer. He explained that both continental and colonial congresses opened sessions with prayers delivered by official chaplains.[99] He noted that even the drafters of the first amendment paid chaplains to

93. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).
94. Larson v. Valente, 456 U.S. 228 (1982).
95. 463 U.S. 783 (1983); *see supra* note 16 and accompanying text.
96. 463 U.S. at 784-85.
97. Chambers v. Marsh, 504 F. Supp. 585 (D. Neb. 1980).
98. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).
99. 463 U.S. at 786-91.

open legislative sessions with prayer.[100] The majority opinion failed to apply either the tripartite test or the strict scrutiny test. In fact, after the Court found sufficient historical support for legislative prayer, the Court applied no test at all. The conclusion that there was no constitutional violation flowed directly from the Court's historical analysis. On the opposite side, Justice Brennan in dissent concluded that Nebraska's actions violated the tripartite test,[101] the strict scrutiny test,[102] and his own *Schempp* test.[103] Justice Brennan concluded his opinion with an attack on the historic exception itself.[104]

Both the majority and dissenting views are best explained by reference to the perceived risk of political oppression of nonrepresented religions or nonreligion. The majority intuitively applied the political oppression criterion and concluded that history proved there was no risk of oppression in Nebraska's actions even though the practice would fail the most tolerant version of the *Walz* tripartite test. On the other hand, Justice Brennan's dissent almost expressly adopted risk of political oppression as the operative criterion. Contrary to the majority's more sanguine view, Justice Brennan concluded that legislative prayer forces unwarranted participation in religion, requires state residents to support a religion they do not believe in, degrades religion by using it to call a secular body to order, and politicizes religion.[105] The majority and the dissent in *Marsh* differed precisely in their assessment of the risk of political oppression presented by the challenged state action. Without an awareness of the determinative role of the political oppression criterion, evaluating either opinion in *Marsh* is difficult.

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100. *Id.* at 788 & n.7. Chief Justice Burger wrote:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment, it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792.

101. *Id.* at 795-801 (Brennan, J., dissenting).

102. *Id.* at 801 n.11 (Brennan, J., dissenting).

103. *Id.* (Brennan, J., dissenting).

104. *Id.* at 813-17 (Brennan, J., dissenting).

105. *Id.* at 808 (Brennan, J., dissenting).

VII. CONCLUSION

If, as this Article argues, the religion clauses have a single underlying purpose, the two clauses should be read and applied as a single conceptual unit, a single constitutional restriction on government. In effect, this Article suggests that a new constitutional holding of "in violation of the religion clause" should be substituted for the existing doctrines under which a court finds a violation of either the establishment clause or the free exercise clause. The risk of political oppression on religious lines should be the criterion by which any governmental action should be measured when challenged under the religion clause.

When a governmental action is challenged as a violation of the religion clause because the action presents some risk of political oppression, the Court should strike down that action unless the government is able to demonstrate an interest sufficient to outweigh the risk of oppression. The assessment of the risk of political oppression and the competing governmental interest offered as justification in any specific case should proceed without reference to current establishment and free exercise categories. The Court's conscious endorsement of such an approach would provide a satisfying explanation for a large number of results previously arrived at by intuition and would provide a theoretical basis from which one could predict results in future cases.