Established Intent

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A Constitutional analysis of the *American Recovery and Reinvestment Act of 2009* with respect to educational subsidies to religiously-affiliated universities; including a proposed framework for the adjudication of issues involving religion and the government.

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I. INTRODUCTION

Sinking economic conditions both domestically and globally have had an impact on many aspects of the American government's interaction with the country. Changes range from more rigorous accounting standards to the use of public funds for ostensible bailouts. The United States especially has seen a dramatic change in policy regarding the role of the government in the private sector, notably in banking and other related industries.

In addition to addressing the banking industry, the new presidential administration, along with a sympathetic Congress, attempted to further invigorate the economy with the *American Recovery and Reinvestment Act of 2009* (ARRA), which was signed into law on February 17, 2009. As the title suggests, this legislation intends to go beyond *recovery* from economic troubles to government *reinvestment* in the economy. In other words, the ARRA commits additional government spending to stimulate economic growth. Areas targeted to benefit from this spending include infrastructure, state information systems, agriculture, and many others—including education.

Despite expanded spending in areas previously untouched by government, ARRA funds are restricted in noteworthy ways. One of the largest and most controversial restrictions placed on ARRA funds is that of section 14004 subsection c. The section provides that "[n]o funds awarded under this title may be used for - . . . modernization, renovation, or repair of facilities (A) used for sectarian instruction or religious worship; or (B) in which a substantial portion of the functions of the facilities are subsumed in a religious mission."[1]

Critics of this restriction have deemed it—and in turn the entire act—"anti-religious"[2] and "discriminating against religious viewpoints."[3] They argue that the exclusion of religiously

[1] 111th Congress, *American Recovery and Reinvestment Act of 2009*, at 167-168 (2009).
[2] Andy Barr, *Huckabee: Stimulus is 'anti-religious'* (2009).

affiliated universities or facilities from receiving funds for modernization, renovation, and repair is a discriminatory practice against religious viewpoints and would thus be in violation of the First Amendment Free Exercise Clause. However, the rationale for such a restriction is substantiated through the First Amendment's Establishment Clause. Arguably, government spending on religious universities and facilities is an establishment of the institution's religion by the government, a practice that would violate the well-recognized belief in a 'wall of separation between church and State.'[4] It seems that there is an inherent conflict between the Free Exercise Clause and the Establishment Clause of the First Amendment—but what are these clauses specifically?

The First Amendment contains two religion clauses, which read: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*." The first clause—the Establishment Clause—seeks to ensure a protection from the establishment of an actual government religion. This clause precludes the government from adopting a specific doctrine or faith, and from using it to influence legislation. The second clause—the Free Exercise Clause—seeks to protect religious freedom for everyone. This clause states that neither the government—nor anyone else—can influence, restrict, or prohibit the religious involvement of anyone else, regardless of the size of their sect. With this amendment, the religious minority is protected in its beliefs and rights from both the government and the religious majority. People are free to choose their faith without pressure or coercion from anyone else. As a way to emphasize the importance of these statements, the Founders placed these two clauses first in the Constitution's Bill of Rights—before any other rights or amendments. On the surface this

[3] Cristina Corbin, *Conservative Groups Declare Obama's Stimulus Bill a War on Prayer* (2009).
[4] See *infra*. section II page 5.

amendment seems rather simple to understand. However, it needs to be analyzed further to truly understand the intents and principles imbedded by the Founders in the First Amendment.

In considering the legality of the restriction of ARRA funds on religiously affiliated institutions of higher education under the First Amendment, this article considers the intent underlying the Establishment Clause and the 'separation of church and State.' The analysis seeks to uncover the specific principles that the Establishment Clause intends to uphold and how such principles have been interpreted by the United States Supreme Court over scores of litigation. Relying principally on language of the Founders, particularly James Madison, as well as interpretations from Ronald Thiemann, former Dean of the Harvard Divinity School, and Frederick Mark Gedicks, law professor at the Brigham Young University Law School, this article develops a theory with respect to how government should and should not interact with religion.

This theory will then be applied to the restriction on funding repairs of facilities used for religiously affiliated activities as specified in the ARRA to determine whether the restriction violates the principles underlying the First Amendment. That conclusion will then be tested and supported by precedents set by the United State Supreme Court to see if such a conclusion can be accepted in a practical legal environment.

It is my hypothesis that the analysis will reveal that the restriction of ARRA funds on religiously affiliated institutions of higher education is viewpoint discriminatory and thus illegal.

II. THE REASONING BEHIND THE SEPARATION OF CHURCH AND STATE

The phrase 'wall of separation between church and state' was first referenced in a letter written by Thomas Jefferson to the Danbury, Connecticut Baptist Association on January 1, 1802. Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.[5]

This letter coined the terminology that has served as the quick standard interpretation of the First Amendment for over two centuries—guiding the government's relationship with religion. Nevertheless, it can be argued that the current interpretation of the phrase, and the First Amendment, is quite different from what was intended by the Founders. Before this comparison can be made, it is imperative to examine the reasons why such language was used, and to discover the principles behind the 'wall of separation.' Understanding the intent of this phrase leads to a more precise understanding of the First Amendment's clauses dealing with religion, and ultimately to a more reasoned analysis of the government's involvement with religion.

James Madison wrote in *Federalist Paper No. 10* that a country founded to seek freedom from the oppression of a monarchy might encounter problems with the same type of majority control it once despised:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and private personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided not according to the

[5] Thomas Jefferson, *Letter to the Danbury, Connecticut Baptist Assocaiation* (1802), in *Thomas Jefferson Writings* (1994).

> rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.[6]

Madison continues the thought in *No. 51*, moving the focus of his point from "measures" insisted on by the majority to the marginalized rights of the minority. According to Madison, "if a majority be united by a common interest, the rights of the minority will be insecure."[7] In these two quotations, Madison identifies two critical sources of concern with respect to majorities over minorities: the displacement of the just viewpoint with the majority viewpoint, and the absolute omission of minority rights.

The *Federalist Papers* were written for the purpose of gaining popular support for the Constitution and making an interpretation of the document widely available. The previous excerpts indentify one of the most important goals the Founder's had in the construction of the American government: the protection of the minority from the majority. And, taking a step further, one of the freshest forms of oppression in their minds was that of religious intolerance due to the absolute rule of the British Monarch. In the introduction of his book entitled *Religion in Public Life: A Dilemma for Democracy*, Ronald Thiemann identifies religious persecution as the reason for the American government's separation from religion. Thiemann argues that "[b]ecause the dangers of religious persecution were fresh in their minds, new leaders of a new nation took extraordinary care to separate the state and politics from faith and sectarianism."[8] This statement goes hand in hand with the Founders' wishes to ensure that religious beliefs are the product of the individual—not the product of a coercive government.[9]

Alexander Hamilton, another primary contributor to the *Federalist Papers*, emphasizes the Founders' concern to ensure that the government does not act as a spiritual authority in

[6] James Madison, *The Federalist Papers No. 10* (1788), in *The Federalist Papers*, at 72 (1961).
[7] James Madison, *The Federalist Papers No. 51* (1788), in *The Federalist Papers*, at 320 (1961).
[8] Ronald Thiemann, *Religion in Public Life: A Dilemma for Democracy*, at ix (1996).
[9] James Madison, *Letter to William Bradford* (1774), available at Familytales.org (2009).

Federalist No. 70 by comparing the proposed President with the British King. Hamilton writes, "[t]he one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church!"[10] The fear—and prevention—of religiously-oriented government leaders was at the forefront of developing the three branches of American government. Hamilton's quote above marks the independence of the president from matters religious—but it is important to note that the other two branches of government were also marketed to the public as free from religious persuasion. In *Federalist No. 57*, which discusses the role of the House of Representatives in Congress, Madison discusses how the Chamber will be free from religious influence—as well as other special interests—as there will be no such requirement for members' election:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[11]

The intent was that a House of Representatives elected free *from* special persuasion would create legislation free *of* special persuasion. Madison underscores this point in his article entitled *Memorial and Remonstrance Against Religious Assessments*, where he makes clear religion's safety from both societal and legislative intercession. Madison states that "[b]ecause religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative body."[12]

This theme of religious independence is continued in Madison's discussion of the Supreme Court—arguably the most important branch of the government, as members are seated

[10] Alexander Hamilton, *The Federalist Papers No. 70* (1788), in *The Federalist Papers*, at 421 (1961).
[11] James Madison, *The Federalist Papers No. 57* (1788), in *The Federalist Papers*, at 349 (1961).
[12] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *James Madison Writings* (1999).

for life, with little if any accountability to the people. In the *Remonstrance*, Madison rejects requests that Supreme Court Justices be religious scholars in addition to being legal scholars. Madison advocates,

> [t]hat the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.[13]

Maintaining that judges and justices are versed in theology as well as law would establish that they preside from a religious viewpoint. Furthermore, Madison implies that—even if it were acceptable—judges cannot rule ultimately on issues of faith, as theology is neither their profession nor expertise. And, if they *were* capable of fully negotiating both theology and law, they would be required to apply solutions religious to matters civil. Assuming that members of the court would hold expertise in the religion of the majority, and allowing for the possibility that members of the other two branches of government would have to satisfy religion requirements, then it is likely that a majority viewpoint based on religion would emerge. Such a result would be contrary to the intent of the Founders.

Alexander Hamilton emphasizes that the judiciary be free of religious interpretation in *Federalist No. 78*, by making it clear that the sole responsibility for the Supreme Court is to negotiate issues of law. According to Hamilton, "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law."[14] Hamilton maintains that the Constitution is a work of law that does not encompass moral judgments motivated by religion. Moreover, he contended that Justices who violate their commitment to the law by imposing their own particular viewpoint on legislation

[13] *Id.*
[14] Alexander Hamilton, *The Federalist Papers No. 78* (1788), in *The Federalist Papers*, at 466 (1961).

will have their decision removed. Hamilton wrote, "[t]he courts must declare their sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body."[15]

Issues involving the place of the religious viewpoint in government were particularly important to Madison in 1785 when he wrote the *Memorial and Remonstrance Against Religious Assessments*. For him, it was not mere political theory; it was a direct response to a proposed law introduced to the Virginia legislature in 1784. The bill introduced in Virginia, entitled *A Bill Establishing a Provision for Teachers of the Christian Religion*, required that each individual in Virginia pay tax towards a sect of Christianity of their choice—regardless of whether or not they belonged to the church. The proposed law provided:

> That for the support of Christian teachers . . . the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due. . . . And be it enacted, that for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books.[16]

The text of the law continues, stating that the tax must be used either to teach the Christian religion or to build places for specific Christian worship. This law was particularly troublesome for Madison.

Madison's opposition to the law was based on the belief that religion is an individual's concern, not the government's. This particular law requires the individual to pay a government levied tax to a sect of Christianity of their choosing, regardless of their personal belief, thereby taking the act of religious contribution away from the people and granting it to the government.

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[15] *Id. at 467*.
[16] *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), in *The Constitution Principle: Separation of Church and State* (2009).

For the state's purpose, an individual must personally establish a sect of Christianity to endorse. This result is directly contrary to the religious freedom the Founders wished to incorporate in the new republic. Madison wrote, "[w]hilst we assert ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[17] Contrary to this view of religious freedom, the Virginia law required the individual to choose not only a religion for which to submit tax, but a specific *Christian* religion. There is no room for personal choice in the matter. In effect, this is a double-establishment of religion: first of religion in the government, and second of Christianity in the government.

Requiring the payment of a tax towards religion would be shocking enough, but forcing individuals to select a form of Christianity removes all personal faith decisions from the law. If passed, the law would allow the government to levy a tax for the sole purpose of supporting the majority religion—thus coercing the believer from any personal minority viewpoint to that of the majority viewpoint. In this respect, the law, which seemed to support the prosperity of religious education, actually specifically endorsed and established Christianity as the state religion. If the government has the power to establish Christianity over other religions—something that may have been overlooked by the public, as the vast majority of Americans were Christian—what would stop it from using this power to establish a single sect of the religion over another? Madison recognized this possibility of government power over religion writing, "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other

[17] Madison, *supra* note 12.

sects?"[18] If passed, laws such as that proposed in Virginia in 1784 have the potential to completely eclipse minority rights, an issue of great concern to the Founders.

James Madison was not the only outspoken opponent of *A Bill Establishing a Provision for Teachers of the Christian Religion*. Thomas Jefferson also added to the discussion, albeit in a more legally specific way. Jefferson authored a bill entitled *Virginia Statute for Religious Freedom*, in which he refers to the previous measure as "sinful and tyrannical."[19] He explains that requiring an individual to contribute directly to a religion via tax—regardless of whether it is his true faith or not—restricts the individual's ability to choose on his own terms how to worship and support his church. Furthermore, Jefferson mentions that the law requires taxpayers to pay for the "propagation of opinions" related to the Christian Church, which would establish that religion in the government. [20] Such an establishment would prevent individuals from making informed and personal religious decisions, and could put them at complete odds with the government. Jefferson wrote that the proposed Virginia bill would "have a like tendency to [banish] Citizens."[21] Jefferson's bill, passed in 1786, proscribed the government from requiring any individual to participate in or support religious worship.[22] The bill stated:

> Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .[23]

The law adds that no measure of faith can affect an individual in his civic duties or involvement:

[18] *Id.*
[19] Thomas Jefferson, *Virginia Statute for Religious Freedom* (1786), in *The Library of Virginia* (2009).
[20] *Id.*
[21] Madison, *supra* note 12.
[22] The bill has since been incorporated directly in the Commonwealth of Virginia Constitution.
[23] Jefferson, *supra* note 19.

> all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish enlarge, or affect their civil capacities.[24]

The message derived from this language is both clear and critical. Jefferson introduced a law that ensured the protection of the principles the Founders sought to instill in the American government: no government opinions or establishment on matters of faith, and no restrictions or requirements for individuals' personal religious choices.

It seems clear that in terms of undertaking issues of faith, the Founders' intent of the government's role was to refrain from judgment. Madison summarized the thought as follows, "[w]e maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."[25] However, nowhere do the Founders say that the government cannot interact *with* religion; merely that the government cannot *judge* or *qualify* religion. Thiemann asks, "[h]ow does one adjudicate, morally and judicially, a conflict between majority [religious] beliefs and minority dissent?"[26] This is the crucial distinction—they do not! With a country so rich in religious and cultural tradition how could a government possibly decide which viewpoints and values are most important to adopt in the government—especially when they may conflict with each other? Thiemann articulates this concern quite eloquently:

> The values, convictions, and virtues of these traditions occasionally coincide, but more often they conflict, often decisively, with one another. How can such conflicting values be coherently reflected in public policy considerations? How can public officials be expected to decide which of these diverse and clashing convictions should be introduced into the public square?[27]

[24] *Id.*
[25] Madison, *supra* note 12.
[26] Thiemann, *supra* note 8, at 7.
[27] *Id. at 4*.

The answer is that these "clashing convictions" *should not* be introduced into the public square—at least not by the United States' government. The government's job is not to decide which viewpoints are virtuous or correct; it is to ensure that all viewpoints have the liberty and ability to operate safely and without restriction in the country.

The previous examples in this section explain how the freedom of religion is to be guaranteed by having a government free from specific faith; and how the minority cannot be squelched by an oppressive majority. But these arguments do not address the issue of how a *secular* government interacts with religion—only that the government need be secular in belief.

As mentioned earlier, nowhere do the Founders mention a restriction of government involvement with religion. In fact, they understood and accepted the opposite—that government can, and should, interact with religion as long as there is no breach of establishment or free exercise. Madison makes this clear in the *Remonstrance*:

> Because [government establishment of religion] will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been split in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.[28]

A government that pretends that religion does not exist, for the purpose of its involvement and legislature, is a naïve government. Religion has been, and still is, a primary motivator in the United States. To ignore it would be to prevent the government's ability to effectively and equally govern the people.

The preceding pages outline the intent and purpose of the 'wall of separation' and First Amendment. However, it is clear that over the course of time, these principles have been misconstrued and interpreted in a way not intended by the Founders. Such a miscalculation has

[28] Madison, *supra* note 12.

certainly had an effect on the adjudication of cases involving religion and the government. The next step in this analysis is to explain the way that this misjudgment has been made and its consequences on the judicial system in the United States.

III. THE EVOLUTION OF RELIGION IN THE GOVERNMENT

As stated in the introduction, the Establishment and Free Exercise Clauses *seem* to work in opposite directions. Nevertheless, the tension is more an illusion than an actual conflict. The perceived conflict arises when the intent behind the two clauses is lost in the Court's interpretation. As an exercise, it is important to examine this misconception. The Establishment Clause restricts the government from establishing or adopting a national or state religion. To conform to this rule, the government may not advance religion. In sum, the government must maintain *separation* with religion in all respects. The Free Exercise clause restricts the government from prohibiting an individual's rights to faith. To conform to this rule, the government may not inhibit religion. The government must therefore *accommodate* all religions and treat them all with *neutrality*. But, what happens in a situation where an individual wants to exhibit his free exercise of religion *in* the government? Or, when the government wishes to subsidize private school teacher salaries, including parochial schools? In these situations it is unclear how to negotiate the issue. This uncertainty has led to a multitude of rulings with differing interpretations of government interaction with religion. The result is an unsure middle ground that has never solidified. Thiemann acknowledges this point in *Religion in Public Life*:

> Former Chief Justice Burger has characterized the problem in the following terms. "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." Since the non-Establishment Clause forbids any governmental assistance to religion, and the free exercise

> clause mandates governmental accommodation of religion, the two clauses can easily work cross-purposes.[29]

The division is not necessarily the fault of those who have sat on the bench—rather a result of the passage of time. Thiemann maintains that "the language of constitutional essentials and basic justice has taken on a degree of independence during the more than two hundred years of this republic's existence."[30] However, the result has been the development of two different methods to evaluate the role of religion in the government—or vice-versa: government separation, and government neutrality.

A. SEPARATION

In his 2002 article entitled *A Two-Track Theory of the Establishment Clause*, Frederick Mark Gedicks explains that the goal of separation is to "ensure that government and religion each operate freely in their own separate spheres, uninhibited by regulation or control by the other."[31] However, to achieve this he adds that "[s]eparation requires that the government sometimes treat religion worse, and sometimes better, than comparable secular activities."[32] This is because, if religion operates in its own sphere uninhibited by regulation, it has much more autonomy in its actions. The laws developed by the legislature affect only secular organizations, and cannot be applied to religious groups. Therefore, laws which *benefit* the secular organization will treat religious organizations relatively *worse*, and the opposite is true. Gedicks makes this aspect of government separation clear in his article:

> Because this rule of abstention frequently renders judicial review of the governance decisions of religious associations unavailable, such associations possess significantly greater freedom to deviate from both

[29] Thiemann, *supra* note 8, at 57.
[30] *Id. at 88.*
[31] Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, at 1072 (2002).
[32] *Id. at 1073.*

> legal norms and their own internal rules and practices than do secular associations.[33]

In separation doctrine, religious activities are unique from all others simply due to their religious nature; and should therefore be kept "rigorously separated" from government, according to Thiemann.[34]

The 1971 United States Supreme Court case *Lemon v. Kurtzman*[35] exhibits the principles of government separation doctrine. This case primarily involves a Rhode Island statute—the *Rhode Island Salary Supplement Act*—that permitted the state to subsidize non-public elementary school teachers with public funds. The eligibility of non-public school teachers to receive funds was determined by a set of restrictions included in the law. Beyond requiring that the per-student expenditures on secular education be less in the non-public school than in a comparative public school, the State placed the following restrictions:

> The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.[36]

It should be noted that the restriction placed on teaching the subject of religion is not the aspect of the statute in question. However, that aspect of the law also conforms to the principles of government separation. Under separation, government subsidized teaching of a religion class would have the effect of advancing religion relative to non-religion, regardless of the specific topics covered in the class.

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[33] *Id. at 1074.*
[34] Thiemann, *supra* note 8, at 64.
[35] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[36] *Id. at 608.*

The question raised in *Lemon* arose through the execution of the law. At that time, 25% of Rhode Island students were educated in non-public schools; of this, 95% of students attended Catholic-affiliated schools.[37] Because of this, most of the teachers who would receive salary supplements would teach at parochial schools. The Court acknowledged that "concern for religious values does not necessarily affect the content of secular subjects," [38] but that "the parochial school system was 'an integral part of the religious mission of the Catholic Church.'"[39] Consequently, although the law does not *explicitly* direct funds to religiously affiliated schools, it has the primary effect of advancing the mission of the respective school's religion because most of the funds would subsidize parochial school teachers.

The Court decided that such a law was in violation of the Establishment Clause because it fostered "excessive entanglement"[40] between the government and religion, and provided "significant aid to a religious enterprise."[41] Due to the fact that most of the subsidies would be paid to members of a Catholic school, the law would advance the mission of religion, in violation of the Establishment Clause. This decision certainly exhibits government separation as, regardless of the method by which the funds were distributed, it benefitted religion—which is prohibited. The Court made this separation apparent in the opinion stating, "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[42]

An important development as a result of the decision in *Lemon v. Kurtzman* was the creation of the Lemon Test. In his opinion, Chief Justice Warren Burger created the three prong

[37] *Id.*
[38] *Id. at 609.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id. at 625.*

test to determine whether a law is in violation of the Establishment Clause. He wrote the following:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion."[43]

This test has set an important precedent for adjudicating issues involving legislations' effects on religion. This test will be used in the subsequent analysis of the *American Recovery and Reinvestment Act of 2009* and its restrictions on the distribution of funds to religiously affiliated schools.

B. NEUTRALITY

Gedicks explains that the goal of neutrality is to "ensure that the degree of acceptance enjoyed by any particular religion is the result of the free and independent choices of its members, undistorted by government coercion or influence."[44] Gedicks continues to state that a government satisfies neutrality when,

> [i]t treats religious beliefs and practices no better, but also no worse, than comparable secular activities. Under an Establishment Clause doctrine informed by neutrality, religious belief and activity are not thought to be unique, and religion is treated as simply one among many possible activities in which citizens might choose to involve themselves.[45]

Thus, neutrality is quite different from government separation—Gedicks describes them to be in "considerable tension" with one another.[46] Where separation requires no involvement with religion at all, neutrality treats religious issues identically to secular activities. This is because the

[43] *Id. at 612-613.*
[44] Gedicks, *supra* note 31, at 1072.
[45] *Id. at 1074.*
[46] *Id. at 1073.*

government treats activities of religion the same as any other type of personal secular activity in society.

This view of neutrality is shared by Thiemann, who states that "neutrality simply requires a policy of *impartiality* in the government's treatment of various religious groups."[47] Thiemann continues to explain that government neutrality analysis *can* be taken beyond mere neutrality in treatment, to actual accommodation of religion in the public atmosphere. Thiemann writes that under such a doctrine "the government should never coerce or proselytize, it should seek to encourage widespread *public sphere accommodation* of religious symbols and behavior."[48] This particular belief is more radical than mere neutrality because it has the tendency to advance religion in a way that could not be matched by a secular activity. Opponents of neutrality—and also accommodation—believe, according to Thiemann, that the religiousness of an organization prevents it from being impartial with respect to government, and should therefore not be treated the same as those organizations that have no such defining beliefs. Thiemann writes, "[r]eligious beliefs, the skeptic may argue, are incorrigible, and thus proponents of such beliefs cannot posses the openness requisite for democratic deliberation."[49]

The 1947 United States Supreme Court case *Everson v. Board of Education*[50] exhibits the principles of government neutrality. This case covers an issue similar to that in *Lemon*, however with a different result—which serves as an example of the tension and conflict between the two doctrines. In *Everson* the court ruled on a New Jersey statute allowing the state Board of Education to reimburse parents of private school students for expenses related to transportation

[47] Thiemann, *supra* note 8, at 65.
[48] *Id.*
[49] *Id. at 133.*
[50] *Everson v. Board of Education*, 330 U.S. 1 (1947).

to and from school—given that public school students already received the benefit. The specific law in question reads as follows:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.[51]

Similar to *Lemon*, the language of the statute does not explicitly produce funds for families of Catholic school children; however, a large portion of the families who would be eligible for the benefit would come from Catholic, or other religiously affiliated schools. The question present in this case is the same as the one in *Lemon*: does the law—although not in language, but in execution—provide significant aid for the advancement of religion? If so, the law would violate the Establishment Clause of the First Amendment.

Unlike the ruling in *Lemon*, the Court found the New Jersey statute well-within the state's abilities with respect to both the New Jersey and United States Constitution. The ruling was based on the Court's finding that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[52] The Court continued to substantiate this argument more directly, indicating that "State power is no more to be used so as to handicap religions than it is to favor them."[53] However, before making the ruling, the Court acknowledged the conflict between government separation and neutrality:

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment

[51] *Id. at 3.*
[52] *Id. at 18.*
[53] *Id.*

> commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.[54]

The Court's ruling depended on acknowledging the difference between the law in question and an establishment of religion. Although the law provides benefits to families who send their children to parochial school, it does not establish that particular religion. The law merely provides benefits to families sending children to non-public schools, regardless of the religion of the family or the school:

> While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.[55]

This finding is reconcilable with the First Amendment because of the way in which general aid based on legislation is given to individuals. Such welfare does not depend on the individual's specific, or lack of, faith. The Court acknowledged that benefits cannot be contingent on faith:

> Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[56]

The Court recognizes no difference between individuals of faith and their respective religions, and those with no faith. The Court reasoned, "[m]easured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils

[54] *Id. at 16.*
[55] *Id.*
[56] *Id.*

attending public and other schools."[57] Under this reasoning, an activity is not considered unique simply because it is affiliated with a religion.

Although the ruling in *Everson* certainly used reasoning based on government neutrality, the Court provided strong dicta that would in the future support government separation:

> 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 non-attendance. 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."[58]

Justice Black's comments above, although firm in sentiment, provide more confusion to the issue of the government's involvement with religion when comparing them to the majority's ultimate ruling on the New Jersey statute. For good measure, he includes the famous words of Thomas Jefferson—reinforcing his views of government separation doctrine despite having earlier delivered a holding consistent with a neutrality doctrine.

Clearly there is tension between the rulings in *Lemon* and *Everson*. In *Lemon*, subsidizing education expenses in religiously affiliated schools is not allowed. However in *Everson*—a case that preceded *Lemon* by more than twenty years—such subsidies were allowed. How did the *Lemon* Court negotiate the ruling in *Everson*? In two ways. First, the Court cited Justice Blacks dicta, reasoning that "[w]e said in unequivocal words in *Everson* v. *Board of Education*, 'No tax

[57] *Id. at 17.*
[58] *Id. at 15-16.*

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.'"[59] Second, the Court noted the factual difference between the two cases involving to whom the state subsidy was paid. In *Lemon*, the funds were paid to teachers, agents of the school. In *Everson*, the funds were paid to the parents of students as reimbursements. The Court relied on this distinction, maintaining that the Rhode Island statute "has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school."[60] Although no distinction was made to the ultimate effect of the funds, the mere difference in who received the money was enough for the Court to rule differently.

As we have discovered through comparing government separation and neutrality analyses—along with respective examples—some work needs to be done with respect to the judicial interpretation and treatment of the First Amendment. As it currently stands, different precedent and doctrine is applied to individual cases on an almost arbitrary basis. Gedicks notes this concern in his article:

> Neutrality analysis now appears to control cases involving government distribution of financial and tangible benefits and services to religious persons and organizations, whereas separation analysis continues to determine cases involving religious worship and speech by government, internal disputes among the members of religious organizations, and the delegation of government power to religious persons or organizations.[61]

How can we expect to exemplify consistency and fairness in the legislative and appellate process if we do not have a solid foundation and framework in which to operate? The next chapter will

[59] *Lemon v. Kurtzman*, *supra* note 35, at 640.
[60] *Id. at 621*.
[61] Gedicks, *supra* note 31, at 1090.

explore the individual and collective shortcomings of the current applications of government separation and neutrality analysis.

IV. THE INSUFFICIENCIES OF SEPARATION AND NEUTRALITY ANALYSIS

When applied together, government separation and neutrality analysis are insufficient in adjudicating issues of religion in the government—if only for the reason that they are in direct conflict with each other:

> Separation analysis prohibits most government aid to, and interactions with, religion, even when these are undertaken on the same basis as aid to comparably situated secular individuals and organizations. Neutrality analysis, by contrast, permits government aid to and interaction with religious individuals and organizations, so long as this is done on the same basis as aid to comparably situated secular individuals and organizations.[62]

As Gedicks explains in the quote above, one doctrine allows for government aid to religion if distributed comparably to secular activities, and the other almost never allows such aid. This inherent contradiction is enough to acknowledge that a new approach is needed. However, does the situation change if only one doctrine is used? It will be seen that even if taken independently, as currently used, the government separation and neutrality doctrines are still insufficient.

As described in section two, two primary concerns of the Founders in the development of the Constitution were that the majority would displace negotiation and compromise exclusively with its viewpoint, and that majority rights would completely omit minority rights. This is exactly what government separation analysis seeks to do; albeit to prevent a religiously driven democracy. Thiemann underscores the point that religiously motivated government power is particularly abhorrent, stating that "[t]he use of religious arguments to impose restrictions on the

[62] Gedicks, *supra* note 31, at 1090.

freedom of others is particularly reprehensible and is unacceptable in a democracy."[63] However, does this allow the 'non-religious' viewpoint such power over the democracy? Thiemann continues his point citing not only religions which are theist, but *all* religions:

> Can public decision makers possibly be responsive to the myriad and often conflicting religious voices of our culture? What public role should be assigned to those religious traditions that do not affirm a Supreme Being or those persons who understand themselves as agnostic, nonreligious, or atheistic?[64]

Thiemann contends that simply because a viewpoint does not incorporate a God or an organized religion does not make it void of theology. In fact, it is quite the opposite—a *non-religious* viewpoint has very *religious* implications. Thiemann summarizes the argument with the following question: "Should the majority religion of the republic have a privileged role in the shaping of the public institutions, programs, and policies?"[65] The answer is certainly no. Nevertheless, if government separation excludes *religious* aid or involvement, is the government actually granting a privileged role to the non-theistic religious voice?

Acknowledging that the opposite of a theistic viewpoint is necessarily another religious viewpoint, it is clear to see that the exclusion of the theist religious voice from any government involvement has the direct effect of advancing *non-religion*—not advancing secular government. Gedicks recognizes this point in *A Two-Track Theory of the Establishment Clause*, arguing that "[i]n a world in which most individuals and groups are entitled to receive government benefits and funding, withholding such benefits and funding solely because the recipient is religious constitute a penalty on religious belief and activity."[66] This is a dangerous precedent to establish, as it proscribes the traditionally religious viewpoint. Strictly following a separationist doctrine

[63] Thiemann, *supra* note 8, at 13.
[64] *Id. at 31.*
[65] *Id. at 3.*
[66] Gedicks, *supra* note 31, at 1088.

will lead to a complete exclusion of theistic religion—which is contrary to the ideal of religious freedom pursued by the Founders. Of course, Gedick's quote above does not imply a formal restriction on theism, nor its practice, but it does place such activity at a distinct disadvantage. The following set of cases exhibit how the exclusion of theistic religion has already progressed in the United States Supreme Court.

The process started with the *Anti-Evolution Law* passed in Arkansas during the 1920s which prohibited the teaching of evolution in public schools in favor of creation, as taught in the Bible. The Supreme Court ruled on the issue in the 1968 case *Epperson v. Arkansas,*[67] finding the law illegal based on its selective exclusion:

> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.[68]

Justice Fortas, writing for the Court, stated that restricting a minority academic viewpoint in favor of a majority viewpoint—let alone a religious one!—restricts students' academic freedom, and in this case advances Christianity. He implies that had the law restricted the subject altogether, the Court may have ruled differently. However, the law as written respected an establishment of religion in the Arkansas state government because it treated the Christian viewpoint as categorically correct. Justice Fortas asserted that religious doctrine is neither the responsibility—nor jurisdiction—of the government, saying that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and

[67] *Epperson v. Arkansas*, 393 U.S. 97 (1968).
[68] *Id. at 109.*

practice."[69] He continues not by saying that the government must refrain from involvements in religion, but that the government must treat religion and non-religion equally as to not coerce the individual in one direction or another:

> [Government] may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.[70]

Paying close attention to his language, Justice Fortas does not restrict the government from involvement with religion. He restricts the government from making value judgments on the validity or truth of one religion over another, or theism over atheism.

The Court's judgment in *Epperson* was an important step in creating a level environment for the freedom of religion *and* non-religion in the public sphere of education without qualifying or judging theology. However, as separation analysis became more popular, the Court took a more aggressive stance against theist origins of life without a corresponding effect on non-religious theories of origin.

The Creationism Act passed in Louisiana required that in order for evolution to be taught, creationism need also be taught to ensure academic diversity. The Court rightfully deemed the law unconstitutional in the 1987 decision of *Edwards v. Aguillard*.[71] Using the reasoning in *Epperson*, the court ruled that *requiring* the teaching of creationism, or *prohibiting* the teaching of evolution through state law establishes Christianity in the school system and in turn the government:

> The Creationism Act is designed *either* to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught

[69] *Id. at 103.*
[70] *Id. at 103-104.*
[71] *Edwards v. Aguillard*, 482 U.S. 578 (1987).

> *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma." Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.[72]

However, the ruling in *Edwards* went beyond that of *Epperson* to universally restrict the teaching of creationism, as it is a necessarily religious theory. The Court ruled that "*creation science*, as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind,"[73] and by requiring the teaching of creation science the law "does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life."[74] However, the Court does not acknowledge that by restricting creationism in the classroom they are *reducing* the flexibility of teachers to teach theories other than evolution—the exact reason it overturned the Louisiana law. The ban of creationism in schools has the exact effect of requiring it: advancing a particular religious belief over another. By restricting creationism, non-theistic theories are advanced at the expense of theistic ones. In this light, the ruling of the Court correctly struck down an establishment of one religious view, but allowed for the establishment of another.[75]

As seen in *Epperson v. Arkansas* and *Edwards v. Aguillard*, the Court has progressively removed religion from the public sphere without a corresponding removal of similar non-religious tenets that reach an equivalent entanglement between the government and theology.

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[72] *Id. at 593.*
[73] *Id.*
[74] *Id. at 587.*
[75] It should be noted that the issue changes if the discussion is about whether to teach the origin of life at all. As seen, it is difficult to teach such a topic in public schools without dangerous interactions with religion.

This is the effect of government separation analysis as currently understood in the Supreme Court. However, government neutrality analysis does not stand much better if taken alone. The Founders were also concerned that religion may become inexorably entangled in the affairs of the government rendering the intimidation and exclusion of many citizens. This is the effect of pure government neutrality as currently used in the Supreme Court. Gedicks articulates this aspect of pure neutrality, "[i]f one imagines alternate regimes respectively governed solely by separation and solely by neutrality, it seems clear that the latter holds more potential for the repression and persecution that characterized the classic establishment of religion."[76] The "classic establishment of religion" is that of the government adopting or directly funding the theology of any particular religion.

It seems counter-intuitive to believe that government neutrality would work towards the exclusion of citizens—but viewing an example makes the concern more clear. Under the purest form of neutrality doctrine, the government "explicitly seeks to broaden the framework within which religion might be freely exercised by expanding the doctrine of accommodation to include public sphere accommodation,"[77] according to Thiemann. Gedicks explains the concept further:

> For example, religious organizations could exercise government power and government could directly encourage and fund religious worship in a regime of neutrality so long as these were done on a religiously even-handed basis.[78]

As long as the government treats each specific religion equally, it could entertain and even advance religious beliefs, practices, and worship. An example approaching this extreme is the 1984 United States Supreme Court case *Lynch v. Donnelly*.[79]

[76] Gedicks, *supra* note 31, at 1098.
[77] Thiemann, *supra* note 8, at 61.
[78] Gedicks, *supra* note 31, at 1099.
[79] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The case involves a state owned and erected nativity display in the city of Pawtucket, Rhode Island which had been used in the celebration of the holiday season for over forty years. The question brought to the Court was whether the display constituted an establishment of religion in the state, in violation of the Establishment Clause. Although the Court acknowledged that the display "advances religion in a sense,"[80] it held that the holiday display was not in conflict with the Establishment Clause because the main purpose of the display was not to establish religion, but to "depict the origins of [the] holiday."[81] The Court relied on the belief that religion can never practically be removed from government in all instances. Justice Burger remarked that no aspect of life—including religion—can be completely separate from the government. On the contrary, he acknowledged that government has a duty to accommodate religion, saying,

> [n]o significant segment of our society, and no institution within it, can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.[82]

According to the Court, if the government was prohibited from providing equal opportunity for the display of religious symbols it would be unduly hostile towards religion, and "such hostility would bring us into 'war with our national tradition' as embodied in the First Amendment's guaranty of the free exercise of religion," according to Justice Berger.[83]

The example in *Lynch* shows how accommodation of religion through neutrality analysis provides the government not only with a passive tolerance of entanglement between state and religion, but almost a responsibility or duty of the government to include religion in its affairs.

[80] *Id. at 683.*
[81] *Id. at 681.*
[82] *Id. at 673.*
[83] *Id.*

This is certainly opposed to the intents of the Founders to provide free exercise of religion for individuals and a government free from religion's influences. Accommodation practices not only influence government with religion, but exclude the free will of citizens opposed to religion by making it a necessary part of government operations. Gedicks explains how accommodations of religion similar to *Lynch* lead to more egregious establishments of religion in the government:

> Public school prayer would be permissible, so long as religious and secular belief systems were given equal access to the prayer opportunity. Sectarian religious instruction could be present in the schools, as one choice among many denominational and ethical secular ones. Tax dollars could even be used to build churches and to pay ministers and priests, so long as such funds were also available to build the meetinghouses and to pay the leaders of comparable secular organizations.[84]

Furthermore, Gedicks argues that government neutrality would require local governments to grant religious organizations power in communities as to not infringe on their free exercise:

> For example, a local government might give religious groups—along with private schools, daycare centers, and other nonprofit businesses—the power unilaterally to prevent the operation in their vicinity of a business to which they have moral objections.[85]

Providing this power would grant the local religion the ability to control the viewpoint in its community without any interference from government. Not permitting such a power would, under neutrality analysis, restrict the religious organization's ability to operate fully under its faith.

The examples Gedicks provides are completely unacceptable, and should never be acted upon. However, they would be permissible in a government where complete accommodation through neutrality is present.

[84] Gedicks, *supra* note 31, at 1099-1100.
[85] *Id. at* 1100.

Comparing the extreme examples of separation and neutrality analysis show that each doctrine alone leads to unsavory outcomes with respect to the intents of the Founders and the Constitution. Even when used in tandem as mutual checks, the inherent contradiction between the two leaves courts with difficult choices about which doctrine to use in individual situations. What the judiciary needs is a framework with which to adjudicate all issues involving religion and government equally. The next chapter will propose such a framework and provide examples of how the framework has already been used—although, not-purposefully—by the Supreme Court.

V. A PROPOSED FRAMEWORK FOR THE ADJUDICATION OF CASES INVOLVING RELIGION

Thomas Jefferson's metaphor erecting a 'wall of separation between church and state' unnecessarily simplifies the complex intricacies of the interactions between religion and the government. Justice Burger acknowledged this in *Lynch v. Donnelly*:

> The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.[86]

In order to treat all issues of religion and the government fairly, one has to comport the applied framework with the intent that was woven into the First Amendment—not a generalizing metaphor. The rights guaranteed by the Establishment and Free Exercise Clauses are paramount in such situations. In chapter two, these intents were presented as the prevention of government adopted religious tenets or beliefs, and an ensured freedom of practice for all citizens without coercion or exclusion.

[86] *Lynch v. Donnelly*, *supra* note 79, at 673.

The practical goal of a government separation doctrine as explained by Gedicks is to "ensure that government and religion each operate freely in their own separate spheres, uninhibited by regulation or control by the other."[87] This high-level value of government separation analysis should be the foundation for the framework with which to adjudicate cases involving religion and the government. A piece of legislation cannot deem any religious organization or belief preferred or acceptable—nor inferior or restricted. From the government's perspective *any* religious activity is separate from the realm of government inspection. Such theological judgments would prefer one religious belief over another, and the government would be working towards the exclusion of its own citizens.

As Justice Burger mentioned in *Lynch*, it is inevitable that government and religion must interact. In these situations—when separation would overwhelmingly discourage the religious viewpoint—the government must use neutrality to govern its involvement. Thiemann explains that the government can neither compare the value of, nor judge at all, the theology of any religious group because "neutrality simply requires a policy of *impartiality* in the government's treatment of various religious groups."[88] But the government must also ensure that the degree of acceptance for any one religious activity is the same as the corresponding secular activity. Whether or not the activity is encouraged at all—either religious or secular—is a much different topic. But the idea remains, if the government is to support a particular activity, whether it be liberal education, charity, or hunger prevention, it must support this activity in *all* organizations—not only secular ones.

In this respect, the religiousness of the specific activity does not make it distinctively different from the same secular activity, because "religious belief and activity are not thought to

[87] Gedicks, *supra* note 31, at 1072.
[88] Thiemann, *supra* note 8, at 61.

be unique, and religion is treated as simply one among many possible activities in which citizens might choose to involve themselves,"[89] according to Gedicks. However, an important addition must be made to providing encouragement—whatever the form—for these activities: the encouragement must be distributed with the secular purpose in mind. In other words, the primary purpose of any such encouragement cannot be to the benefit of religious organizations or their sectarian mission—the primary purpose must be to the benefit of the underlying *secular* activity. Taking this further, the distribution criteria for the 'encouragement' must also be secularly based. For example, if the development of homeless shelters is the government's legitimate purpose, it cannot provide funds or other aid *only* to religiously affiliated shelters. The government must provide the aid according to secular criteria it deems best. Any religiously motivated criteria for the distribution of aid in the efforts of a legitimate cause would result in an unnecessary advancement, or inhibition, of religion.

For example, the government cannot enact a law which provides funds to any organization for the purpose of teaching Judaism. Regardless of whether the funds are distributed to churches, synagogues, sports teams, or political action committees, funds for the teaching or advancement of specific sectarian causes advances religion and establishes the beliefs in the government. Even if the distribution criteria to distribute funds are secular—meaning that the law does not provide funds to groups based on their religion—the goal and supported activity of the law would be to primarily advance religion. According to the *Lemon Test*, such aid would excessively entangle the government with religion, in violation of the First Amendment Establishment Clause.

To summarize, the government can certainly have involvements with religious organizations, as long as these involvements do not endorse the particular religion's theological

[89] Gedicks, *supra* note 31, at 1074.

viewpoints. For example, the government cannot exclude churches from garbage disposal, utilities, or emergency services simply because they are religious buildings. Next, the government cannot sponsor or encourage an activity which has the primary purpose of advancing or restricting religious beliefs. Any government program must have a clear secular purpose. Furthermore, if the government is to encourage or aid a worthy cause, it cannot exclude religious organizations from receiving the benefits of the encouragement. Although this is a high-level set of principles, it is a framework that the judiciary should use, and refine, in its discussions of specific cases. In fact, the Supreme Court has already exhibited this framework in a number of cases, the best example of which is the 1995 case *Rosenberger v. Rector and Visitors of the University of Virginia*.[90]

In this case the Court heard a challenge of the University of Virginia's policy of restricting Student Activities Fund (SAF) dollars to eligible student organizations with a religious viewpoint—specifically a Christian-affiliated news journal.[91] The editor of the journal argued that the restriction of funds to the journal was discrimination against religious viewpoints because other non-religious student run newspapers did receive funding from the school. The Court found the University of Virginia's policy a violation of free exercise and free speech based on a number of factors. The Court ruled that withholding funds would be a "denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.[92]

First, the Court determined that the school's purpose in providing funds to student organizations was to further the secular purpose of encouraging student speech and creativity—

[90] *Rosenberger v.University of Virginia*, 515 U.S. 819 (1995).
[91] Eligibility is gained on a number of factors unimportant to the issue at hand.
[92] *Rosenberger v. University of Virginia*, *supra* note 90, at 845-846.

not to advance religion. The University contended that it withheld funds from the journal to avoid directly advancing a religion with state controlled funds. The Court disagreed:

> The governmental program here is neutral toward religion. There is no suggestion that the University created [the SAF] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.[93]

The Court emphasized that the reason funding is acceptable is because the journal engages in the secular purposes of diversity and free speech; and "there is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."[94] If the student organization's purpose was solely for the worship and practice of religion such funding could be omitted according to the Court: "[t]he University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.'"[95] This distinction is imperative. The state may involve itself with religious organizations as long as the purpose for the involvement *and* the activity of the organization has clear secular purpose. The Court reasoned that "any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis."[96]

Second, the Court decided that the withholding of funds required the University to judge the content of student publications to determine if there were religious implications in the text: "[t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions

[93] *Id. at 840*.
[94] *Id. at 846*.
[95] *Id. at 840*.
[96] *Id. at 844*.

respecting religious theory and belief."[97] Such a task would require the government to qualify what is and is not religious—not the role of a government that is to remain separate in religious theology. The University argued that providing funding for the journal may imply to onlookers that the speech in the journal was written, operated, or endorsed by the University. The Court denied this argument citing specific University policy regarding SAF funding:

> A standard agreement signed between each [organization] and the University provides that the benefits and opportunities afforded to [organizations] "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."[98]

The precedent established in *Rosenberger* is important because it specifies that activity performed by a secular group otherwise acceptable does not change merely because it is performed by a religious group:

> We granted certiorari on this question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious."[99]

The *Rosenberger* decision confirms that the religiousness of an organization does not make it distinct from non-religious groups with respect to secular activities.

The reasoning in *Rosenberger* was followed in a more recent case, *Board of Regents of the University of Wisconsin v. Southworth*,[100] involving a similar issue. In *Wisconsin* the funding came from a similar mandatory student activity fee that the University distributed to eligible student organizations. Respondents argue that the activity fee required them to fund speech

[97] *Id. at 845.*
[98] *Id. at 824.*
[99] *Id. at 720-721.*
[100] *University of Wisconsin v.Southworth*, 529 U.S. 217 (2000).

contrary to their personal beliefs, morals, or religion and would therefore oppose the First Amendment. The Court held the University's practice was well within the scope of the Constitution based on two factors. First, the Court held the University's "mandatory student activity fee and the speech which it supports are appropriate to further its educational mission,"[101] specifically extra-curricular student participation and maintaining a diverse academic environment. Second, the funds were distributed based on a viewpoint neutral method, and offered to any eligible student organization.[102] Furthermore, the Court acknowledged that in no way could the speech funded through the school's distribution be confused for state speech because "materials printed with student fees must contain a disclaimer that the views expressed are not those of the [University],"[103] and in turn the state. The Court acknowledged that had the speech in fact been the University's, the evaluation might be different.

Both *Rosenberger v. University of Virginia* and *Wisconsin v. Southworth* allow the use of state controlled funds to benefit religious organizations because of clear secular purposes behind the activity and funding, and viewpoint neutrality in secular methods of distribution. These cases work well within the framework of principles guided by the intents of the First Amendment. To iterate, the government involvement must be evaluated as to its primary effect, the distribution criteria, and the underlying activity of the organization. Now, with a framework supported by precedent, the application must be made to the *American Recovery and Reinvestment Act of 2009*, to determine if the restriction of bailout funds should be allowed to benefit religiously affiliated schools, and further, if the restriction would result in an unnecessarily hostile treatment of religion.

[101] *Id. at 221.*
[102] Eligibility is gained on a number of factors unimportant to the issue at hand.
[103] *Wisconsin v. Southworth*, *supra* note 100, at 225.

VI. APPLICATION TO THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

To determine if the clause included in the *American Recovery and Reinvestment Act of 2009* which restricts funds paid to religiously affiliated schools is constitutional, it is vital to revisit the previously developed framework and to understand the restrictions that it will be applied to. The framework identifies three primary factors of any legislation that need to be evaluated. First is the primary effect or goal of the legislation. If the legislation has a *primary* effect of advancing or restricting religion or religious beliefs it must be deemed in violation of the First Amendment. It is not the role of the government to promote religion, its tenets, or practices. Second, the distribution criteria of the law need to be analyzed. Are funds distributed on a basis that favors or disfavors religiously affiliated organizations? If so, the distribution criteria of the law must be changed to provide aid to groups in a secular and religiously viewpoint neutral method. Third, the activity of an organization receiving funds needs to be analyzed. If the main activity of the organization is religious in nature and not primarily performed towards the government's acceptable goal, the organization's activity is considered religious in nature. Such activity should be excluded from receiving government legislation aid. The mere affiliation with religion is not enough to make an activity unique, however if the activity is religious in nature it *is* unique.

Funds awarded by the ARRA may be used only for "modernization, renovation, or repair of institutions of higher education facilities that are primarily used for instruction, research, or student housing,"[104] in such a way as to mitigate increases in tuition and fees. The law then specifically restricts such funding for institutions or facilities "used for sectarian instruction or

[104] 111th Congress, *supra* note 1, at 167-168.

religious worship; or in which a substantial portion of the functions of the facilities are subsumed in a religious mission."[105]

The first step is to uncover the reason the government wants to provide funds to universities. The program is incorporated in the ARRA, a law meant to stimulate economic growth and halt further economic losses for both institutions and individuals. The law is not an effort to directly encourage increases in education across the country—however that may be a tacit goal. The explicit objective of the funds related to universities is the mitigation of tuition costs for students; if this has the effect of advancing education, well done. Are the goals of minimizing tuition increases and a corollary support of education consistent with government principles and interests? Yes, they are. Although no constitutional amendment addresses this issue specifically, affordable education is paramount in continuing the nation's success and development. With respect to the primary goal of the legislation in question, it is acceptable, if not, admirable. Next, the distribution criteria need to be analyzed.

Although no specific information is available to determine the criteria by which funds are distributed to institutions of higher education, the law itself provides some insight. There are two restrictions: no funds may be awarded to institutions of sectarian instruction, and no funds may be awarded to institutions with substantial religious mission. These are two very different restrictions because of the underlying activity performed by the institutions. In the first, the activity is actual religious instruction—that of a seminary or monastery. In the second, the activity, although not explicitly described, is ordinary liberal education as taught in a religiously affiliated university. Now, each of these activities must be compared to a secular equivalent, if possible. As explained earlier, religious activity is not unique solely because it is performed by a religious organization. It is unique if the activity itself is religious in nature.

[105] *Id.*

The first restriction is on sectarian instruction, of which there is no secular corresponding activity. This makes the activity uniquely religious and a direct advancement of the theology of the organization. For this activity, the government cannot provide public funds for any cause related to its educational goals, whether it be maintenance, tuition mitigation, or renovation. Such aid would encourage and endorse the beliefs and theology of the institution. Therefore, the first restriction in the Act is permissible and necessary.

The second restriction is on liberal education as taught in religiously affiliated schools. Thousands of corresponding secular activities and organizations engage in the same task. The fundamental activity of the organization is also secular—liberal-arts education. These activities are fully consistent with accepted and encouraged government interests and programs. Based on this, the government should provide funds to religiously affiliated schools if it is providing the same funds to secular universities. Whether or not the government wishes to provide such funding is another consideration. As long as the money is distributed to each school on a secular method, not favoring one school over another for religiously motivated ideas, the government cannot be considered to endorse or advance any one religion over another, or religion over non-religion.

The preceding analysis places the ARRA's restriction on funds paid to religiously affiliated liberal-arts universities in conflict with the proposed framework. However, does this conflict result in undue hostility towards religion, and an encroachment of free-exercise? If the government were to restrict funds to the liberal-arts education efforts of religiously affiliated schools while at the same time providing such aid to secular schools, it would be treating the organization's activities as uniquely different merely because of its religious affiliation. This is discrimination of the religious viewpoint, as the underlying activity of the school would not

advance, or endorse a particular theology in the government if subsidized. Any subsidy would simply encourage university education. Therefore, such a restriction *would* be unnecessarily hostile towards religious viewpoints and an encroachment on the organization's free exercise. With this said, the sections of the ARRA including this restriction should be deemed unconstitutional. The government can either preclude all funding of educational institutions through the law, or allow funds to reach religiously affiliated institutions.

As explained above, the proposed framework conflicts with the ARRA restriction on institutions with mere religious affiliations. However, how does this conclusion compare with a similar analysis using one of the leading standards to test such legislation—the Lemon Test? The Lemon Test consists of three prongs, each of which needs to be satisfied in order for the legislation to stand. The first prong tests whether the legislation has a clear secular purpose. The second prong tests whether the law has a primary effect of advancing or inhibiting religion. The third prong tests whether the law creates excessive entanglement between the government and religion.

Applying the Lemon Test to the ARRA section in question yields a seemingly simple result—although in direct contrast with the conclusion reached under the proposed framework. The ARRA passes the first prong of the Lemon Test as it seeks to mitigate tuition expenditures for students—a clear secular purpose. In similar fashion, the ARRA passes the second prong because the *primary effect* of the law has little effect on religion. Finally, the ARRA passes the third prong as there is no entanglement between religion and the government, because it is restricted. Based on the criteria of the Lemon Test, the ARRA is constitutional.

Clearly, there is a disparity between the proposed framework and the Lemon Test. The ARRA restriction *fails* the framework's test yet *passes* the Lemon Test. This is a result of the

emphasis of each method of analysis. The framework evaluates legislation from both the separation and neutrality angle—ensuring that a law remains void of theological judgment *and* discrimination. However, the Lemon Test evaluates exclusively from a separation angle—attempting to ensure almost entirely that a law does not interact, or entangle, religion and the government. Consequently, the Lemon Test third prong views the restriction placed on ARRA funds towards religiously affiliated liberal-arts universities as essential in preventing excessive entanglement with religion. If the restriction were not present, based on the third prong alone, the law might fail. In exclusively trying to prevent entanglement, the Lemon Test allows discrimination against the religious viewpoint. This shows how adjudicating with either a separation or neutrality focus alone results in counter-intuitive decisions and dangerous precedents. It is imperative for legislators and judges alike to acknowledge the interplay between separation and neutrality and ensure that the intended principles incorporated by both are maintained.

The framework provided above is by no means a comprehensive solution to the issues of religion in the government. It is meant to be a set of principles to guide and balance any analysis of legislation that may have an effect on religion. It is often difficult to accept that the intents of the Founders can possibly have the same meaning in such different times as these—and this is sometimes true. However, for many issues and concepts, the Constitution outlined principles that are immutable. Religious freedom and freedom of speech are certainly two of the values thought to be germane in any time period. The great *wall of separation* was built to ensure that the tenets and faith of any religion do not permeate the activity of the government, but also to protect the rights of citizens to practice any faith they deem virtuous. These goals do not have political

implications, and should never become fodder for partisan messages. They are values that should be espoused and guarded by everyone as long as we are American.

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