THE DOCTRINE OF 'PERVASIVE SECTARIANISM' AND THE BOND LAWYER'S DILEMMA

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Introduction and Historical Overview

"Back in the day" a bond lawyer's task was relatively simple when it came to dealing with the partner down the hall whose kids went to parochial school. All that was required was sensitivity and diplomacy, because legal analysis was superfluous. A sad smile, and a little shake of the head ..."Sorry, but it's unconstitutional to use tax-exempt bonds for pervasively sectarian institutions." Parochial schools[1], after all, were presumed by the courts to be "pervasively sectarian". The factors underlying these conclusions were protean – shifting, without precise tests.[2]

> *The constitutional questions raised by the First Amendment to the United States Constitution[3] are obviously fundamental to bond counsel's validity opinion.[4] This article offers detailed, practical guidance on dealing with these issues. First, we will set forth certain guiding principles to provide perspective on the confusing morass of authority. Second, we will identify two distinct frameworks for reviewing the cases and analyze several distinct types of cases applying the Religion Clauses. The article will analyze these lines of authority, with a particular focus on decisions of the United States Supreme Court and the United States Courts of Appeals. Third, the article will offer a framework for gauging whether a particular governmental interaction with religion is constitutional by identifying a multi-part matrix of factors arising from these distinct lines of case law. Finally, the article will focus on particular issues confronted by practitioners of the laws of tax-exempt finance and their clients, and apply the matrix analysis to several recurring scenarios. In that context, the cases dealing specifically with tax-exempt bond finance and the First Amendment will be analyzed.*

For many bond lawyers, this question first arose in the 1970's and 1980's, when many states adopted financing statutes for industrial development projects, private health care facilities and private colleges and universities. A host of state Supreme Court cases from this period addressed a variety of constitutional issues, including Establishment Clause questions. In 1973 the United States Supreme Court ruled that tax-exempt bonds benefiting Baptist College in South Carolina were constitutional.[5] The *Hunt* Court noted that tax-exempt financing was an unusual and very limited sort of aid, if it was aid at all.

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement of a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the [bond] Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. [6]

The Court then went on to analyze Baptist College within the framework of the *Tilton* analysis from 1971[7], rather than the *Walz* analysis of 1970[8], because, under the facts presented, it did not need to address the broader issues. Specifically, the Court considered a long list of factors which it said supported the conclusion that Baptist College fit within the *Tilton* mold, because it was merely religiously affiliated rather than pervasively sectarian[9]. Thus, applying the *Lemon* test[10] and following the lead of *Tilton,* the Court held that tax-exempt financing was constitutional in this context, with a caveat about "pervasively sectarian" institutions balanced by a strong suggestion that no aid was, in fact, present.

The *Hunt* case is the Supreme Court's only discussion regarding the church-state issues and tax-exempt financing. As such, it is obviously bedrock law. However, the holding of the Court was designed to fit within existing precedent (i.e. *Tilton*), on the narrowest possible grounds. While the Court did not hold that tax-exempt financing is not state aid, its discussion indicates that this is a likely result. More importantly, neither did the Court hold that tax-exempt financing for "pervasively sectarian" colleges would violate the Establishment Clause. This particular issue was not addressed, and this, too, should be bedrock law for bond lawyers.

A flurry of cases involving religious colleges followed in state courts across the country, brought for the purposes of validating new financing statutes for private higher education. By their very nature, these cases were intended to lay the foundation for the favorable applicability of those statutes to a broad array of schools. Therefore, to the extent that specific institutions provided the focal point of these "test" cases, they were located near the middle of the religious affiliation spectrum; indeed they were specifically intended to line up well with the existing case law for religiously affiliated schools from *Hunt, Tilton* and *Roemer*[11]. In other words, these were cases designed neither to draw lines eliminating certain colleges nor to settle the hard issues, but rather to clear the way for the great majority of transactions. Discussions of Religion Clause issues in these cases emphasize the passive nature of tax exemption, the limited nature of state aid and the lack of public funds or tax moneys. In some cases, state courts specifically refer

to tax-exempt financing as a mere governmental service like police or fire protection or as a mere subset of broader tax exemption.[12]

During the 1970's and well into the 1980's, the Court was aggressively "separationist". The apex of that viewpoint is marked by the Court's *Ball* and *Aguilar* decisions in 1985.[13] By the late 1980's and early 1990's, however, a new trend was clear in the case law. The Supreme Court began developing exceptions to the old absolute bar on participation by "pervasively sectarian" institutions in certain activities.[14]

The Bond Lawyer's Dilemma

Therefore, a dilemma has arisen for bond lawyers. Historically, only facts which fit within the patterns of *Hunt, Tilton* and *Roemer* were acceptable. Now, however, the world is different, and bond lawyers must decide which fact patterns outside the specific *Hunt* facts allow tax-exempt financing. The problem is particularly acute for bond lawyers because of the "unqualified opinion" standard, often phrased as being a level of sufficient certainty as to the law, particularly regarding validity, that it would be unreasonable for a court to hold otherwise.[15] How is this standard to be applied in this context?

Several specific scenarios illustrate this conundrum: 1) religiously affiliated primary and secondary schools, 2) pervasively sectarian colleges, 3) service/mission activities of religious entities, 4) institutions which limit their membership to a particular faith and 5) actual church buildings.

With regard to elementary and secondary education, the courts have sometimes noted the difference between college environments and lower schools in their analysis. Historically, a general notion existed that the combination of pervasively sectarian environments and younger children created a higher bar for constitutional validity. A plethora of cases have addressed various forms of state aid to parochial elementary and secondary schools since 1947, but the incontrovertible movement over the last ten to fifteen years is toward constitutionality, resulting in a significant, if not total, erosion of this presumption.[16] Is this presumption still valid in the context of tax-exempt finance?

A second problem scenario confronted by bond lawyers concerns institutions of higher education which might be categorized as pervasively sectarian. Again, recent case law has significantly undermined the vitality of the doctrine of pervasive sectarianism.[17] What does *Hunt* require in light of this?

A third scenario involves religious organizations or their affiliates engaged in social service activities other than education or health care.[18] Increasingly, the burden of filling social service and social welfare gaps in our society is being shifted from governmental entities to the private sector, which can be divided into religiously affiliated and secular service providers. Faith-based organizations are therefore being brought into the mainstream of these social service programs, even using government funding. To what extent can tax-exempt bond financing be used by faith-based entities to help create the capital infrastructure for social service delivery? Is it possible that a faith-based, federally funded service provider would still be ineligible for tax exempt financing for the facilities in which federal program dollars will be spent? What

limitations do the religious motives and methodologies impose upon participation by such groups in this way?

The fourth scenario is really a subset of either of the first two described above, and deals primarily with schools with specific "faith statement" requirements for participation in the community. Does this requirement automatically (or under any circumstances) trigger problems, particularly under Justice O'Connor's analysis?

Finally, the question of tax-exempt financing of actual church sanctuaries, etc. will inevitably arise. What are the relevant tests under the new order? Is it ever permissible?

How should bond counsel proceed to deal with these issues?

Guiding Principles

Practitioners should first step back and take a look at the "big picture". Several guiding principles emerge which can help a bond lawyer negotiate the labyrinth of case law.

First, the Establishment Clause itself is not supreme, nor does it stand alone; rather, it is one expression of the multi-faceted guarantee of individual rights in the First Amendment and a corresponding limitation on the governmental powers. The Establishment Clause must also be integrated with other guarantees of individual liberty found in the Bill of Rights such as free speech and the Free Exercise Clause. Indeed, the Establishment Clause is only one-half of the First Amendment's injunctions with respect to religion. It serves the purpose of blocking governmental imprimaturs on religion itself or on any particular religion. On the other hand, the Free Exercise Clause blocks governmental incursions against individual religious beliefs and expressions. Neither clause, standing alone, would fully secure individual liberties in this arena. For example, the establishment of a state faith would inevitably diminish the civil and political standing of others in the community, even if these others were expressly permitted to exercise their own faiths freely. Similarly, limits on religious expression may not involve the establishment of a governmental orthodoxy.

Second, the purpose of the Establishment Clause is the protection of individual liberties from the government's power to control or influence individuals. What particular evils is it intended to combat? There are many expressions in the case law, but they boil down to two broad categories of concerns – first, subsidies and controls of religion by government, and second, the endorsement of (or in more extreme form, indoctrination in) particular religious views enforced by the power of government.[19] While these may obviously overlap, they are nonetheless distinct concerns.

Third, governmental hostility to religion is simply not justified by Establishment Clause concerns. This point seems obvious, but has often been forgotten. Denials of, or restrictions on, individual liberties are simply not required or permitted by the Establishment Clause.[20]

Fourth, notwithstanding the lore of Establishment Clause law, there is simply no "wall of separation" between church and state, or to the extent there is, it is neither high nor impregnable, as some would assert, but rather a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[21] A variety of individual religious views and

behaviors are integral to the vitality of American life and have been so from the beginning. The great act of nation-making in our revolutionary and constitutional period was one of conscious compromise on religious matters, designed to mold the several states, each with its own distinct (and often religious) character, into a single nation and to simultaneously secure individual liberties, particularly including religious liberties.

Further, the complexity of interaction between governments and religious institutions has increased in recent decades, largely due to the increasingly pervasive role of government in modern life. Chief Justice Burger's commentary in 1970 is even more relevant today:

> Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact, and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a state's boundaries along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an *ad valorem* property tax and the receipt of these municipal benefits.[22]

Sixth (and the most difficult), the line between religious and secular activities is very difficult to draw. For a truly religious person, the most mundane activities are infused with faith. Distinctions based on religious attitudes underlying or motivating particular civil behaviors are inevitably disastrous and lead to bad law. Such a focus is inherently inimical to First Amendment freedoms.

Finally, just as there is overlap among the various liberties secured by the First Amendment, there are overlapping rationales between the various cases defining the boundaries of Religion Clause jurisprudence. These complex interactions do not fit pre-set categories. Nevertheless, analytical categories are useful, both in predicting the outcome of disputes and in shaping appropriate interactions.

Organizing Framework

With these guiding principles in mind, we can turn to the case law, and quickly learn that some type of organizing framework must be found for the tangled thicket of individual cases. Two separate organizing principles are offered herein, the first of which is simply chronological, while the second focuses on several distinct lines of cases, primarily at the Supreme Court level.

Chronological Framework

Four periods can be identified in the United States Supreme Court jurisprudence on the Religion Clauses. For simplicity's sake, these are labeled as follows:

- The assertive period (from 1940 to 1970, approximately);
- The separationist period (from 1970 through the early 1980's);
- The dismantling period (from the early 1980's to the mid-1990's); and
- The modern period (from 1997 through the present)

Obviously, there is overlap; nonetheless, the location of a decision within these basic time frames can be analytically useful. Clearly, in analyzing and applying Establishment Clause questions, bond lawyers should not be fixated solely on the cases from any prior period.

The Assertive Period

Prior to 1940, Establishment Clause jurisprudence was an untilled field. Governmental interactions with religion were commonplace and unchallenged. In 1940, however, the Supreme Court invalidated a Champaign, Illinois program which brought private religious teachers into public schools specifically to teach religion.[23] Through the early 1960's, the Court continued to strike down programs such as official prayers in public schools[24] and scripture reading in public schools.[25] However, during the same period a state law restricting sales of instructional materials by a religious group was stricken[26], Sunday closing laws were permitted[27] and payments to parents reimbursing them for the cost of public transportation for parochial school students was approved.[28]

What is the difference between these two groups of cases, and how can they be reconciled? A simple comparison is instructive. The first group of cases involve the direct infusion of specifically religious activities into either publicly funded or governmentally sponsored civil life. The second set of cases does not do so, or to the extent such an attempt is made, the Court refuses to allow the power of government to be used by majority religious views to suppress minority ones.

This is the first period of Supreme Court jurisprudence on the First Amendment, extending from roughly 1940 through 1970, in which the Court asserted the applicability of the Establishment Clause in fundamentally new ways.

The Separationist Period

However, the early cases, even those cases which upheld governmental action, contained overblown rhetoric regarding the evils of establishment. [29] By the early 1970's this rhetoric had hardened into a philosophical foundation on the Court which was profoundly at odds with the Court's actual decisions; consequently, the meaningful distinctions of the early cases became lost in their more colorful dicta. By the 1970's the dicta of earlier cases had become constitutional presumptions, and the Court was caught in the morass. When the emerging notion of "pervasive sectarianism" was coupled with the wall metaphor as an analytical touchstone, historic distinctions regarding the type and context of aid were wiped away. As Joseph P. Vitteritti states in "Blaine's Wake: School Choices, The First Amendment and State Constitutional Law":

> Taken together, the *Lemon* and *Nyquist* rulings would serve as the philosophical foundation for a series of decisions negating the legal distinction between direct and indirect aid. In outlawing a Pennsylvania program for partial tuition reimbursement, the Court completely lost sight of the benefits that might accrue to parents and children.[30]

This, then, is the second period of the Court's Religion Clause jurisprudence, which essentially began in 1971, when the Court enunciated grand principles for deciding establishment

Clause cases, by creating the "*Lemon* Test". The *Lemon* Court ruled that a Rhode Island program that paid teachers in religious schools 15% of their base salary to supplement their income was unconstitutional, because the restrictions placed on participating schools resulted in "excessive entanglement" between government and religion. The Court described three main evils that the Establishment Clause addressed as "sponsorship, financial support, and active involvement in religious activity." It then offered an oft-cited, three-prong test for judging constitutionality:

- a statute must have a secular legislative purpose;
- its principal or primary effect must be one that neither advances nor inhibits religion;
- and the statute must not foster an excessive government entanglement with religion.[31]

The *Lemon, Tilton, Hunt, Meek, Nyquist, Wolman,* and *Roemer* cases from the 1970's represent the strongest separationist period in the Court's history, which reached its culmination in *Ball* and *Aguilar* in 1985.[32]

The Dismantling Period

It soon became clear, however, that the *Lemon* test was unworkable and created a tangled underbrush of conflicting cases by the mid 1980's. *Lemon* has been the target of abundant criticism, much of which has come from within the Supreme Court itself. Among the most colorful expressions of dissatisfaction are the comments of Justice Scalia:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its place and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart, and a sixth has joined in an opinion so doing.[33]

At one level, problems with the *Lemon* test arise from an historical debate over the fundamental relationship of church and state in society – a debate which focused on the wall metaphor in the 70's and 80's and resulted in the aberrational case law. Does dis-establishment mean separation, and how absolute, how firm, how high should/can a "wall of separation" be?

A strong secularist bias underlies the strict separation decisions from the 1970's in particular. This bias is most readily seen in the opinions of Justice William O. Douglas. For example, in his concurrence to *Lemon*, Justice Douglas attacked the very idea of giving any money to parochial schools, which are obviously religious in character and motivation. Douglas found the very idea of separating the secular and the religious aspects of schools to be intolerable and wrongheaded. Giving money to Catholic schools to teach chemistry was, for Douglas, still a subsidy for the Roman Catholic Church and, therefore, financial support which benefited religion in a way completely unintended by the Founding Fathers. Even incidental benefits were

unconstitutional for Justice Douglas. However, this principle has been specifically repudiated numerous times by the Court. [34]

The notion of absolute separation is biased toward a fundamentally secular society in which there is no significant interaction between government and religious institutions. This viewpoint essentially prejudges the application of the *Lemon* tests to consistently produce unconstitutionality for a certain class of societal participants precisely because of their religious beliefs. Pursuant to this logic, a pervasively sectarian entity is automatically precluded from significant interactions with the state. If an entity is pervasively sectarian (a determination which is itself subject to bias), all aid of substance is unconstitutional, either because the second prong of *Lemon* is automatically violated or because the protective firewalls accompanying such aid create political divisiveness and excessive entanglement. Thus, according to this view, a "wall of separation" lies between church and state. However, such a wall is fundamentally inimical to both the Free Exercise clause and our long, rich national history of free religious expression and religious liberty. In such a secularist state, churches would receive no tax-exemptions, governments would provide no chaplains in the armed forces, in prisons, or in legislatures, and religious institutions would pay for, or not receive, police and fire protection. Correspondingly, churches would not be provided compensatory benefits for those services providing benefits to society in the form of education, enhancement of mental health, and advancement of the arts, for example.[35]

At another level, however, *Lemon* has proven to be unsatisfactory because each of its three prongs is essentially conclusory in nature, and further criteria must be advanced and weighed in order to make proper determinations. The Court has not always done so, and the outlines of these relevant criteria were historically quite sketchy.[36]

Justices Rehnquist and O'Connor, in their 1985 opinions in *Wallace*,[37] offered illustrative criticisms of the flawed use of Jefferson's "wall of separation" from within the Court. Rehnquist was explicit in his rejection of the wall as demonstrating either the Framers' intent or a proper modern-day understanding of the relationship between church and state. Far from being a wall, the line of separation is, as Chief Justice Burger cautioned in *Lemon* itself, "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[38] Rehnquist believed the wall porous enough to allow the federal government to provide non-discriminatory aid to religion.

Justice O'Connor articulated in her *Wallace* concurrence what has become a hallmark of her opinions on Establishment Clause matters — dissatisfaction with *Lemon*'s insensitivity to individual choices. She wrote: "the Establishment Clause is infringed when government makes adherence to religion relevant to a person's standing in the political community."[39]

This willingness to rethink the secularist assumptions of the *Lemon*, *Meek*, and *Nyquist* majorities has resulted in a fundamental shift in the Court's holdings, led over the years by the opinions of Rehnquist and O'Connor. The debate began to return to its roots in the 1980's, focusing again on neutrality and balancing both Religion Clauses. During this period, the dismantling of the "wall of separation" began in earnest. Shifting coalitions within the Court produced reams of critiques of *Lemon* and results which strayed all across the landscape of church/state interaction. Nonetheless, the Court slowly began to develop a disciplined

underlying framework for discerning and applying those factors which lead to appropriate constitutional conclusions under the *Lemon* "test." This process was marked by the reassertion, as shifting pluralities allowed, of the importance of the nature and character of the interaction between church and state in determining what it means for government to advance or inhibit religion in an impermissible manner. Strict separation was put to rest by the Court in *Agostini* in 1997.[40]

The Court's movement away from the "wall" goes down multiple, interwoven paths. These paths can be traced in the lines of cases discussed below.[41] Progress down these paths is made with each incremental step taken by the Court in specific factual situations. Ultimately, patterns and principles emerge from the aggregation of these specific analyses and illustrates the problems inherent in the separationist viewpoint.

The Modern Period

Agostini

The modern period begins in 1997 with *Agostini*,[42] which is a watershed case in First Amendment jurisprudence, overruling the Court's prior 1985 decisions in the same disputes between the same sets of parties, because of intervening changes in the Court's legal analysis. This alone makes *Agostini* worthy of analysis.

In *Ball* and *Aguilar*, the Court considered the case of public school teachers providing various non-sectarian, remedial educational services in private schools, including a number of Roman Catholic schools, which the Court concluded were pervasively sectarian. (In New York City these public school teachers were also subject to significant religious monitoring under the program.) Both programs were held unconstitutional in 1985. *Ball* and *Aguilar* were summarized by the *Agostini* Court as follows:

> [T]he Court's conclusion that the "Shared Time" program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work...; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state...; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion, because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.[43]

The *Agostini* Court concluded, in an opinion by Justice O'Connor, that the *Ball* and *Aguilar* assumptions had been "undermined" by subsequent cases, inasmuch as the Court had modified its approach to these issues in "two significant respects. . . . First, we have abandoned the presumption erected in *Ball* and *Meek* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or

constitutes a symbolic union between government and religion."[44] "Second, we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid."[45]

Further, the Court considered the question of whether the programs improperly advanced religion, even if they did not subsidize religious entities, by creating a financial incentive for an individual to undertake religious indoctrination. Citing the neutrality principles (implicit and explicit) in *Everson, Allen, Mueller, Witters* and *Zobrest*, the Court noted allocation criteria in the programs that "neither favor nor disfavor religion. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services."[46]

Finally, the Court held that New York City's shared time program had not created excessive entanglements.[47] First, the Court noted that its rulings in *Agostini* and *Zobrest* et al. removed the legal basis for requiring significant monitoring. The Court also noted that, in the *Bowen* case for example, it had not found excessive entanglement in cases involving "far more onerous burdens on religious institutions than the monitoring system at issue here."[48]

On its face *Agostini* did not overrule *Lemon*: it merely elucidated proper methodologies for the three-prong test.[49] However, it clearly overruled certain of *Lemon's* progeny and severed the basic intellectual premises supporting the separationist view of the Constitution. The decision radically undermined the prior tendency to rule by simplistic mechanical formulae. The *Agostini* court declared that the presence of public employees performing secular tasks at public expense on the premises of even pervasively sectarian institutions is not enough to lead to "endorsement" as a matter of law, and that pervasively sectarian does not inevitably yield unconstitutionality.

Helms

The effects of *Agostini* were not uniform in the lower courts, however, until after 2000, when the Supreme Court, by a combined vote of six to three, overruled portions of two prior Supreme Court decisions disallowing state funding of educational equipment and teaching materials in private schools. In *Mitchell v. Helms* the Court found constitutional a federal program providing secular educational equipment and training to both public and private schools.[50] The Court overruled its 1975 *Meek* decision[51] and overruled its 1977 *Wolman* decision[52] in part. Justice Thomas wrote a sweeping and impassioned opinion for a plurality of the Court. Justices O'Connor and Breyer joined with a concurring opinion, overruling *Meek* and a portion of *Wolman*, but rejecting the full scope of the Thomas opinion. According to the concurrence, *Helms* is merely an extension of the principles already announced in *Agostini.*[53]

Justice Thomas' opinion relied specifically on the first two prongs of *Agostini*'s revision of the *Lemon* test and concluded that the statute in question (i) neither resulted in religious indoctrination by the government, nor (ii) defined its recipients by reference to religion. Thomas relied upon *Agostini* to declare that the proper framing of the first issue asks whether any indoctrination resulting from aid to a religious entity is reasonably attributable to governmental action:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government…To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose…, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[54]

The plurality opinion elevates the principle of neutrality to a dominant analytical position. Neutrality can be assured by "private choices" and can further be enhanced by the form of aid. However, it is neutrality itself which is key, regardless of how it is achieved or secured.

The critical second element to the Thomas rationale is the content of the aid. The plurality opinion went at least two additional steps further than the concurrence by arguing that even actual diversion of the state-funded assistance to religious purposes would not invalidate the statute, because the issue is not divertibility but content.[55] Specifically religious assistance was not permitted by the statute in question in *Helms*. Justice Thomas argued that, because such diversion was against the law, it could not reasonably be attributed to the government, and therefore the government could not reasonably be considered to be engaging in improper religious indoctrination.

Finally, the plurality opinion concluded with an eloquent denunciation of the doctrine of pervasive sectarianism. Justice Thomas cited the Court's increasing disregard of that doctrine in recent years, and further denounced the doctrine as "shameful," having been "born of bigotry."[56] The plurality vehemently disavowed its continued relevance to First Amendment analysis. The concurring Justices, however, were unwilling to go quite that far.

Helms clearly stands in the line of recent cases (including *Agostini*) which specifically overrule anomalous Supreme Court precedent, further marginalizing the impact of the pervasively sectarian doctrine. At least four justices are adamantly opposed to the very idea of inquiring into the particular substance, nature and fervor of religious beliefs in order to determine whether state aid is acceptable. In the minds of these Justices, moreover, pervasive sectarianism is not just an irrelevant analysis: it is an offensive doctrine and should be affirmatively set aside. While not yet the law of the land in all circumstances, this plurality position reflects a seismic shift in the basic underlying battlefield for Establishment Clause disputes.

Justices O'Connor and Breyer, in concurrence, also believed that *Agostini* controlled and required the overruling of *Meek* and *Wolman*. However, these Justices were troubled by two specific aspects of the plurality opinion:

> First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of establishment clause challenges to government school aid programs. Second, the plurality's approval of actual

> diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.[57]

On the latter point, the concurrence determined that mere "divertibility" was insufficient to prove unconstitutionality, which instead would require proof of actual diversion. Underlying the concern over the elevation of neutrality as the sole guiding principle is the belief that other factors might also be constitutionally significant under appropriate facts. Thus, strictly speaking, the *Helms* case is merely an extension of *Agostini* to another specific fact pattern previously considered by the Court and the consequent overruling of anomalous case law. This, however, is significant in and of itself.

Zelman

On June 27, 2002, the United States Supreme Court delivered its long-awaited decision on school vouchers.[58] *Zelman* answered many of the questions which remained after *Helms* regarding the continuing validity of the pervasively sectarian doctrine. *Zelman* reversed the Court of Appeals for the Sixth Circuit and upheld Cleveland's voucher program by a 5-4 vote in a majority opinion written by Chief Justice Rehnquist.[59]

After an extended recitation of the problems confronting the Cleveland public school system, the Court concluded that the voucher program[60] was but one part of a multi-faceted initiative enacted by the Ohio legislature to improve Cleveland's schools, including tutorial assistance, community schools and magnet schools, in addition to the voucher program. Even within the narrower confines of the voucher program, all private schools within the boundaries of the Cleveland school district and all public schools in adjacent school districts were potentially eligible participants. Schools were required to apply to participate and meet certain standards (not particularly related to religion) in order to participate.[61] In addition to meeting statewide educational standards, "participating private schools must agree not to discriminate on the basis of race, religion or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin or religion'".[62]

The secular purpose of the Cleveland voucher program was undisputed, so the Court focused on the question of whether "the Ohio program nonetheless has the forbidden effect of advancing or inhibiting religion."[63] Chief Justice Rehnquist drew a sharp distinction between the Court's decisions on direct government aid programs (citing *Helms, Rosenberger* and *Agostini* [64]) on the one hand, and "programs of true private choice in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals" on the other.[65] The majority concluded its discussion of *Mueller, Witters* and *Zobrest* by declaring that these cases

> make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a

> religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient not to the government, whose role ends with the disbursement of benefits. [66]

The *Zelman* Court concluded that the Cleveland voucher program offered genuine options to parents by virtue of both the eligibility of non-religious private schools and public schools for participation in the program and the other aspects of a multi-faceted state initiative allowing parents also to choose tutorials, community schools or magnet schools. Consequently, "the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipients, not to the government, whose role ends with the disbursement of benefits."[67] The Court relied upon the notion of the "reasonable observer" to conclude that "[A]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[68]

The majority rejected the findings of the lower court (and the assertions of Justice Souter in dissent) that no genuine choice existed because the evidence showed that almost all the aid made its way to religious schools. The Court cited *Mueller* to the effect that it was not interested in snapshots of particular time periods. It further stated that the lower court (and Justice Souter) had focused the inquiry too narrowly. The decision should be made "viewing the program as a whole and not by looking in a particular area, at a particular time."[69]

The majority also rejected the claim that *Nyquist* controlled the outcome of *Zelman*. First, there were significant factual distinctions between the Cleveland initiative and the New York program at issue in *Nyquist*. Second, the *Nyquist* program was narrower in scope (being limited exclusively to private schools) and therefore, essentially for an invalid purpose of providing financial support to private sectarian institutions in financial crisis.[70] Finally, the Court noted that it had expressly reserved judgment in *Nyquist* with respect to "a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian/non-sectarian or public/non-public nature of the institution benefited" – in other words, precisely the case presented in Cleveland.[71] The majority went on to hold that "*Nyquist* does not govern neutral educational assistance programs which, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion."[72]

The majority opinion significantly limits the scope of *Nyquist's* precedential authority and essentially relegates it to the rare occasion when the validity of a program's purpose is more at issue than its effect. Secondly, *Zelman* also clarifies the methodology by which an analysis of "neutral effect" should be conducted - that is, not by reference to a narrowly focused snapshot but based on the broader context in which a particular program might be implemented. This is of particular significance in the context of tax-exempt finance, as shown in the final section of this article.

Alternative Framework - Paths Away from the Wall

In addition to the chronological organizing framework described above, the case law can also be broken down into several reasonably distinct lines of authority. Several of these lines

chart separate courses away from the "wall of separation" and the anomalies of the separationist period. These can be considered separate lines of authority, in part, because they reflect different types of grievances against governmental actions perceived to be for or against religion. Some involve endorsement or even indoctrination questions, while others focus on subsidies or entanglement. Still others involve special treatment of some kind based on religion, often resulting in exclusion from some meaningful aspect of civil or political life. Some categories involve challenges of establishment, while others claim free speech or free exercise violations, often triggered by concerns about establishment, thus turning the separationist era cases around 180 degrees. The last category of cases focuses specifically on the underlying topic of this article – i.e., tax exempt bonds.

There are seven basic categories of case law on Religion Clause issues relevant to our concerns:

1. Prayer cases,
2. "Crèche" cases,
3. Access cases,
4. Special treatment cases,
5. Indirect aid cases,
6. Direct aid cases, and
7. Finally, bond cases.

The significance of the first and second broad categories is relatively limited in the context of this article. However, they illustrate certain fundamental principles of Establishment Clause law regarding "indoctrination" and "endorsement," which are at one end of the spectrum of Establishment Clause concerns. In the "prayer cases" for example, we see a consistent concern about the dangers of establishment by virtue of required religious expression in a public forum, producing both endorsement and indoctrination issues. The recent (and popularly maligned) Ninth Circuit decision striking the phrase "under God" from the Pledge of Allegiance is simply the most recent fruit from this branch of the case law.[73] The Supreme Court addressed these questions most recently in *Santa Fe,* but cases date back into the "assertive period" discussed above.[74]

The second line of cases deals generally with phenomenon of religious displays on public buildings or grounds. In recent years the issues have become focused in this arena on whether a nativity scene, cross or menorah is an expression of governmental speech (giving rise to "endorsement") or private speech. In 1995, the *Capital Square* concurrence by Justice O'Connor discussed the "reasonably informed observer" standard, which has evolved into a critical part of the endorsement analysis.[75] A further issue in these "crèche" cases involves whether symbols retain their primary character as religious in the context of the display or have been diluted into mere cultural (or even commercial) symbols. These cases generally involve symbolic speech rather than specifically religious activities.[76]

The third line of cases deals more directly with the issues addressed in this article. In a sense, they resemble the crèche cases, but deal with actual religious usage of public space rather than public symbols. This path explores the need to balance the interaction of various clauses

within the First Amendment of the U.S. Constitution, including both Religion Clauses and the Free Speech Clause.

The 1981 *Widmar* case provides an appropriate starting point for these "access cases". In *Widmar*, the issue whether religious groups could have access to public facilities on a college campus on the same basis as other groups, and the Court struck down restrictions preventing access based on the religious content of speech. In so doing, the Court denied a claim that access under these facts would provide a governmental endorsement of religious views.[77]

In subsequent cases the Court has repeatedly upheld the notion that public groups cannot be denied access to public facilities simply on the basis of the religious content of their speech or behavior. In *Mergens*, a religious club was held to have been improperly prohibited from participating in a high school student activities program because of its religious character.[78] In *Lamb's Chapel* the Court held that a city could not deny a religious group use of meeting space which was otherwise available for public use.[79] In 2001, this principal was extended to younger children in *Good News* when the Court held that the Establishment Clause did not require the exclusion of an evangelical club for middle schoolers from school premises during student activity time. In fact, the Court rules that free speech and free exercise rights required the inclusion of Good News Club in the limited public forum the school had created.[80]

The fourth line of cases is among the most currently active and provides a bridge between the direct aid cases discussed below and the access cases. These decisions are distinguished by the fact that some person or group has been singled out for special treatment on the basis of religion (usually discriminatory treatment, but on occasion special benefit), and further by the resulting challenges to that practice. These cases typically go beyond simple access to public facilities and involve some form of affirmative aid programs which make improper distinctions based on religious views or conduct.

In *McDaniel* the Supreme Court ruled that the Establishment Clause neither justified nor required a Tennessee law disqualifying clergy from being delegates to a state constitutional convention, and further that such a law violated the Free Exercise Clause.[81]

In *Rosenberger* the Court held that the University of Virginia could not deny a student religious group the funding available to other student publications simply because its publication was religious, and, in fact, held that such funding was required on free speech grounds. [82]

By contrast, in *Texas Monthly*, the Court struck down special benefits awarded only to religious and not other publications, and in *Kiryas Joel* the Court struck down a special school district created for a particular religious sect. [83] In neither situation was the basic principle of neutrality honored.

In *Lukumi Babalu* the Court struck down a municipal ordinance purporting to regulate animal slaughter on health grounds because it concluded that, in fact, the ordinance was an attempt to single out and prevent certain religious behaviors objectionable to the majority (i.e. the Santeria religious practice of ritualistic animal slaughter). The ordinance in question did not pass the required scrutiny for the regulation of religious conduct, because there was no showing of a compelling interest which had been addressed on the narrowest grounds. [84]

A very recent (July 17, 2002) Ninth Circuit decision provides an excellent summary of this line of cases. In *Davey v. Locke* the Circuit Court refused to permit the State of Washington from excluding a student in a pervasively sectarian college from a generally available, neutral scholarship program simply because he had declared a pastoral ministries major. In distinguishing other cases, the Ninth Circuit concluded that the

> bottom line is that the government may limit the scope of a program it will fund, but once it opens a neutral "forum" (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion. (emphasis added) [85]

The fifth line of cases involves direct aid programs challenged on the basis of a claim that assistance benefits faith-based organizations. The lineage of this category goes back at least to *Lemon* and *Tilton* in 1971 and extends in the Supreme Court through *Agostini* and *Helms.* Seen through the lens of *Zelman,* the current state of the law can be summarized as follows:

Programs are not generally subject to challenge

- Which serve valid secular purposes,
- Which are neutral on their face and neutral in their application with respect to religion,
- Which do not apply the aid for religious activities,
- Which do not define their beneficiaries on the basis of religion,
- Which do not induce or coerce beneficiaries to choose for or against religion, or
- Which would not lead a reasonable informed observer to conclude that the government was endorsing religious beliefs or behavior.

The relevance of the "pervasive sectarianism" of an institutional beneficiary in this analysis is marginal under recent case law. *Agostini* formally recanted the adverse presumptions arising from the doctrine in the 1970's and 1980's, while reserving its relevance in appropriate situations. The *Helms* plurality went out of its way to eviscerate the doctrine, while the concurrence continues the *Agostini* reservations. Finally, *Zelman* conclusively demonstrated the utter irrelevance of the doctrine in the context of "indirect aid".[86] Justice Kennedy, in his concurrence in *Bowen* provided the most useful guidance on the current status of pervasive sectarianism and Justice O'Connor cited this idea favorably in her *Helms* concurrence. The Virginia Supreme Court picked up this theme in *Virginia College Bldg. Auth. v. Lynn* as follows:

> In the context of her concerns over actual diversion of government aid to religious activities, Justice O'Connor favorably cites Justice Kennedy's concurring opinion in *Bowen* … where the remand to the District Court is explained as follows: "The only purpose of inquiring further into whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion." (emphasis added).[87]

The current status (at least prior to *Zelman)* of the pervasively sectarian doctrine can best be illustrated in the Fourth Circuit Court of Appeals, which been the source of very interesting developments in Establishment Clause case law over the years. Maryland's Sellinger program has for many years provided direct grants from taxpayer funds to private colleges to support the general, secular educational activities of those schools. In the 1976 *Roemer* case[88], the Supreme Court approved the application of the program to certain Roman Catholic colleges because religion did not so permeate these colleges to the extent that their religious and sectarian roles were indivisible. In so ruling, the Court followed its prior decisions of *Tilton* and *Hunt* by making a distinction between religious affiliation and "pervasive sectarianism." The *Roemer* opinion contained dicta that "no state aid at all can go to institutions that are so pervasively sectarian that secular activities cannot be separated from sectarian ones."[89]

Columbia Union College, a Seventh Day Adventist liberal arts college, first applied for Sellinger monies in 1990. In 1992 Maryland denied the grants on the grounds that Columbia Union was pervasively sectarian. After the *Rosenberger* decision in 1995, Columbia Union requested reconsideration of its application, which was again rejected by the Maryland governing body on the same grounds. In 1997, the Federal District Court in Maryland upheld that determination and held that the *Roemer* line of cases, while mitigated to some extent by subsequent Supreme Court decisions, was still intact and directly controlled the case.[90] However, the Fourth Circuit remanded the matter to the District Court for a reexamination of whether the school was pervasively sectarian, noting that the Supreme Court has set the bar for finding an institution of higher learning as pervasively sectarian to be quite high. [91] The Fourth Circuit directed the lower court to analyze Columbia Union College to determine whether it in fact possessed "a great many" of the following characteristics:

- mandatory student worship services;
- an expressed preference in hiring and admissions for members of the affiliated church for the purposes of deepening the religious experience or furthering religious indoctrination;
- academic courses implemented with the primary goal of religious indoctrination; and
- church dominance over college affairs as illustrated by its control over the Board of Trustees and financial expenditures.[92]

The Fourth Circuit concluded that the District Court's 1997 decision was flawed in two respects:

> First, the Court rested its conclusion that Columbia Union is "pervasively sectarian" on an incomplete record, and second, the Court often considered those facts it did have before it in the least, rather than most, favorable light to Columbia Union. Accordingly, we must remand to the District Court for further proceedings.[93]

The District Court returned its decision on August 17, 2000 after the Supreme Court's *Helms* decision. The District Court analyzed *Helms* in great detail and then turned to its instructions from the Fourth Circuit. It concluded that a finding of pervasive sectarianism required "the existence, to a rather substantial degree, of three or more of the enumerated characteristics . . ." The court examined the facts regarding Columbia Union in detail and concluded that, while it possessed two of the four elements of a pervasively sectarian institution, this was insufficient to create a finding of pervasive sectarianism. Therefore, the District Court concluded that the Maryland Higher Education Commission had infringed upon Columbia Union's free speech rights by denying aid based upon its religious viewpoint.[94]

The Fourth Circuit Court of Appeals delivered its affirming opinion on June 26, 2001. The Fourth Circuit concluded that the District Court was not clearly erroneous in finding that Columbia Union College was not a pervasively sectarian institution. Further, the Circuit Court went on to hold separately that, following either the principles in Justice Thomas' plurality opinion in *Helms* or the "neutrality plus" test set forth in Justice O'Connor's *Helms* concurrence, Columbia Union College should have access to the benefits of the Sellinger program without resort to an analysis of whether it is pervasively sectarian. [95]

The Circuit Court's principal holding that the school was merely religiously affiliated is significant in that it provides an example of a modern analytical framework for the analysis of pervasive sectarianism. However, the court's further holding is also significant – that the nature of the aid provided in the Sellinger Program, because of its neutrality and secular purposes and uses, did not require an analysis of pervasive sectarianism. Therefore, even a pervasively sectarian institution could participate in the Sellinger program, because this tertiary factor never becomes material to the analysis.

A sixth line of cases focuses on the indirect character of the aid. There are two branches to this tree, the first of which begins with *Walz,* in which the Supreme Court ruled that property tax exemption for churches was constitutional. Chief Justice Burger spoke for the Court as follows: "We cannot read the New York statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private property institutions." [96]

Further:

> 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…Obviously a direct money subsidy would be a relationship pregnant with involvement and as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory administrative standards, but that is not this case…The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. There is no genuine nexus between tax exemption and establishment of religion…The exemption creates only a minimal the remote involvement between church and state and far less than the taxation of churches.[97]

Walz also extends the logic of property tax exemption to federal income tax deductions and to federal income tax exemption for the operations of a religious entity.

> For so long as federal income taxes have had any potential impact on churches – over 75 years – religious organizations have been expressly exempt from the tax. Such treatment is "aid" to churches no more and no less in principle than the real estate tax exemptions granted by states. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise, at the very least, this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.[98]

Finally, the Court declared:

> Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a state's boundaries along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an *ad valorem* property tax and the receipt of these municipal benefits.[99]

Surely, modern life in 2002 is far more complex, with far more interactions and points of contact between church and state, than that cited by the Court in 1970. Justice O'Connor's concurrence in *Zelman* acknowledges this fact. In order to establish that *Zelman* produced no radical shift in relationships between government and church (and therefore, that no reasonable observer could find an "endorsement"), Justice O'Connor discussed in specific detail the extensive financial relationships between governments and religious organizations. Justice O'Connor offered a detailed review of particular tax exemptions and deductions for religious purposes and the financial realities of those exemptions, referencing many of these benefits as "well established" policies (through *Walz* and *Mueller*, for example).[100]

Mueller itself is the beginning of the *Zelman* line of cases establishing the private choice doctrine, yet it also fits within the *Walz* line of cases. Minnesota taxpayers were allowed tax deductions for expenses incurred in educating their children, including parochial school tuition. The *Mueller* Court cites *Walz* favorably on the specific issue of deductions for charitable contributions to religious institutions.[101] The Court established to its satisfaction that the Minnesota program had the elements of a "genuine tax deduction" which were specifically reserved in the *Nyquist* decision.[102] The Court concluded that the tax deductions available to parents provided only "attenuated benefits" to religious schools.[103]

Again, the Court's only decision on tax-exempt bonds and the Establishment Clause strongly indicates the Court's doubts about whether tax-exempt financing is, in fact, state aid at all within the meaning of the Establishment Clause. *Hunt*, however, did not require the Court to answer the question. Footnote 7 in *Hunt* reads as follows:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement of a state for expenditures made by a parochial school or college, and no extending of or commitment of a state's credit. Rather, the only state aid consists, not of financial assistance *directly or indirectly* which would implicate public funds or credit. but the creation of an instrumentality…through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. (emphasis added).[104]

Mueller also provides an appropriate starting point for the "private choice" or *Zelman* line of "indirect aid" cases. In *Mueller*, the Court's prior holding in *Nyquist*, a Minnesota program providing tax benefits to parents of children in private schools was upheld. First and foremost, the program was neutral in its purpose and application. Further, the assistance, which was a tax exemption for parents, was provided by the state indirectly to the parents, and not as a direct cash subsidy to schools.

Another major step was taken down this path with the *Witters* decision in 1986 when the Court ruled "that the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director."[105] Again, neutrality was a key factor, as well as the fact that aid followed the independent choices of the private recipients of the aid, even though (unlike *Mueller*) it actually flowed ultimately to some religious institutions.

In the 1989 *Hernandez* decision, the Court considered entanglement issues involved in tax deductions for gifts to religious groups as part of the general deduction rules under the tax code, and found no establishment resulting therefrom.[106]

The Court moved a significantly further distance in the 1993 *Zobrest* case, in which a sign language interpreter employed by the state as part of a neutral program assisting deaf students was allowed to assist a student in a Catholic high school without running afoul of the First Amendment.[107]

Zelman culminates both subsets of this sixth line of authority and is discussed above at length. Why, however, did the majority find it so important to distinguish the Cleveland situation from its very recent precedents of *Agostini* and *Helms*? After all, both of these cases approved aid programs to parochial schools.

The answer to this fundamental question can be found early in Justice O'Connor's concurrence[108], which declared *Zelman* to be different, in part because a significant portion of the funds appropriated for the voucher program "*reach religious schools without restrictions on the use of these funds*." [109] (emphasis added).

This sentence unlocks *Zelman*'s broader ramifications. The majority's restatement of *Mueller's* claim that neutral and "true private choice" programs are "not readily subject to challenge under the Establishment Clause"[110] takes on new meaning: in fact, such programs are essentially exempt from challenge.[111]

Zelman, therefore, stands for the following propositions:

- If a governmental program
  - ❖ has a valid secular purpose, which is neutral with respect to religion,
  - ❖ is applied on a neutral basis with respect to religion, and
  - ❖ moreover, provides aid directly to a broad array of recipients who may exercise their own genuine private choices to redirect the aid to institutions without regard to whether they are religious or not,

  then the program is essentially exempt from Establishment Clause challenge.

- In such a program the use to which government money may ultimately be put cannot be attributed to the government, nor can any usage be properly interpreted as governmental endorsement of religion by a reasonable observer. The independent private choices of individual recipients break the chain of causality.

- This is so, regardless of the character of the downstream recipients and without regard to whether any such entity is secular, religious, religiously affiliated, sectarian or pervasively sectarian.

- Further, such an aid program is normally exempt from constitutional challenge even if the aid is ultimately used for religious purposes or activities.

By way of contrast, direct governmental aid programs (such as those in *Agostini* and *Helms)* are subject to a somewhat higher level of constitutional scrutiny. In essence, they may require a further analysis as to whether governmental aid will actually be *used* for religious purposes. One factor in making such a determination is the religious character of an institutional participant in a program; that is, the activities of a pervasively sectarian institution might be more easily perceived as religious than similar activities of another organization.[112] As the Court has often stated, extra Establishment Clause dangers exist where direct aid to a pervasively sectarian entity might result in an establishment of religion.[113]

However, the presence of an extra degree of scrutiny does not mean an inevitable finding of "establishment." On the contrary, the Court has held on numerous occasions that particular forms of direct aid may be permissible. For example, under the right circumstances:

- Subsidized bus transportation for parochial school students is constitutional,[114]
- Subsidized secular textbooks for parochial schools are constitutional,[115]
- Subsidies of evangelical student publications are constitutional,[116]
- Subsidies of remedial education programs conducted by public school teachers in parochial schools are constitutional,[117]
- Subsidies of the administrative cost of diagnostic testing for parochial school students are constitutional,[118]
- Subsidies of auxiliary services, materials, equipment, etc. in parochial schools are constitutional.[119]

- Subsidies of teen pregnancy prevention programs in religious hospitals are constitutional, and[120]
- Subsidies of the administrative cost of standardized tests are constitutional.[121]

What are the "right circumstances" under which direct aid to pervasively sectarian institutions would be constitutional? In each of the above cases, aid was administered pursuant to programs that had valid secular purposes which were neutral with respect to religion. Aid was also administered in a neutral manner with respect to religion. Finally – and this is the point of distinction with the *Zelman* line of cases – aid was administered with appropriate safeguards to assure that it was neither to be used for religious activities nor improperly safeguarded by procedures which would result in an excessive entanglement between church and state.

As the majority took such pains to note, and as Justice O'Connor so carefully clarified, *Zelman* represents the culmination of a separate line of cases delineating a more desired status for interaction between church and state, one carrying a lower level of constitutional scrutiny, in which courts need not inquire into either the ultimate use of the aid or the religious character of the ultimate downstream recipients of aid. This is so whether aid is *de minimus* or substantial, so long as the purpose is truly valid, neutral and secular and the aid is truly indirect.

Zelman deals specifically with indirect aid by virtue of the genuine and independent private choices of individuals who are the primary recipients of aid. However, tax exemptions, deductions and other similar benefits have also been declared indirect. As we have seen:

- Governmental services and property tax exemptions for churches are constitutional.[122]
- Tuition deductions to parents of private school children are constitutional.[123]
- Vocational scholarships for students, including professional ministry students, are constitutional.[124]
- Sign language interpreters for hearing-impaired students in parochial schools are constitutional.[125]
- A school voucher program which provides families with a variety of choices irrespective of religion is constitutional, even when a substantial amount of vouchers are used in religious schools.[126]
- Tax deductions for charitable gifts to churches do not create unconstitutional entanglement.[127]

This new clarification by the *Zelman* Court was greatly needed after *Helms.* What *Helms* and *Agostini* did not answer is the extent to which an institution's "pervasive sectarianism" can adversely affect its capacity to participate in governmental programs. The *Helms* plurality rejected the doctrine in its entirety, calling it shameful and offensive, and called for its disavowal by the courts.[128] However, the *Helms* concurrence by O'Connor and Breyer refused to go that far. Citing *Agostini,* they reserved on the possible applicability of an analysis into the religious character of an institution, primarily to sharpen the analysis into whether the governmental aid assists religious activities or can be perceived to do so by the public.[129]

By contrast, "pervasive sectarianism" is never mentioned in the *Zelman* opinion – the words themselves are simply never used. It is not mere coincidence that this term, publicly

denounced by four justices only two years earlier, is absent. In the majority and O'Connor *Zelman* opinions, variations on the word "religious" are instead used well over 100 times. In contrast, the word "sectarian" appears only 11 times in the majority opinion (never in combination with "pervasively", however) and always within a quote from a prior case or brief, and the term "pervasively sectarian" is never used.

Whether pervasive sectarianism is dead letter in direct aid cases, it is clearly irrelevant to indirect aid cases. When neutral government aid reaches religious institutions only through the genuine independent private choices of individuals in a neutral context, there is no reasonable claim of governmental advancement, inhibition, subsidization, endorsement, or disapproval of religion.

The seventh line of cases deals specifically with tax-exempt bonds. Three very recent cases specifically discuss tax-exempt bonds, all of which conclude that tax-exempt bonds are constitutional with respect to particular religiously affiliated institutions. These constitute (together with *Hunt* and a host of early state court cases) the final line of authority discussed in this article.

In *Sacred Heart*, the Sixth Circuit affirmed the United States District Court of Eastern Michigan's decision that qualified 501(c)(3) bonds issued by Oakland County, Michigan under its general economic development bond statute for the benefit of Sacred Heart Academy, a Catholic secondary school, did not violate the Constitution.[130] The Sixth Circuit's opinion focuses on the findings that the school was merely "sectarian" rather than "pervasively sectarian" in character. One member of the three judge panel concurred with a separate opinion for the express purpose of stating his reservation that the Court of Appeals decision might be read too narrowly to exclude pervasively sectarian institutions from the benefits of tax-exempt financing, a result he felt would be neither necessary nor appropriate.[131] The case is significant in part because it extends the *Hunt* principles to lower education.

The Sixth Circuit was clearly attempting to honor the injunctions of the United States Supreme Court in *Agostini,* etc. that lower courts, while analyzing and applying the general trend of Supreme Court decisions, should nevertheless continue to rely on any directly controlling Supreme Court precedent, even if its underlying basis conflicts with more recent findings. In other words, lower courts have been admonished to allow the Supreme Court itself to modify or overrule its prior decisions.[132] Thus, the Sixth Circuit felt itself to be thrown back to the Court's "pervasively sectarian" dictum in *Hunt.*

The *Lynn* case involved an application for tax-exempt financing for Regent University, a graduate and professional school. The trial court followed the prior controlling decision by the Virginia Supreme Court regarding Liberty University in *Habel.*[133] In 2000, however, the Virginia Supreme Court, in a very thorough and well-considered opinion, overruled *Habel* based upon intervening Supreme Court precedent interpreting the Establishment Clause.

The Virginia Court's analysis is exemplary. That court specifically found that Regent University, in "both policy and practice, is pervasively sectarian."[134] The court went on to review recent United States Supreme Court decisions such as *Agostini* and *Helms* and concluded both that aid had been approved in numerous situations involving pervasively sectarian

institutions, and that "consideration of an institution's pervasively sectarian nature, although limited in impact, remains appropriate." The Virginia Supreme Court then focused on the analysis by Justice O'Connor in the *Helms* concurrence, noting particularly her citation of Justice Kennedy's concurrence in *Bowen*[135] as follows: "The only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being use to further religion."[136]

The Court noted that in *Helms, Agostini* and five other cases, at least, "it was the nature of the aid that was dispositive of the Establishment Clause question, not the nature of the institution", but concluded that "both the nature of the aid and the nature of the institution receiving that aid must be appropriately considered and balanced."[137] To do so, the Court looked at *Hunt,* and after reviewing *Hunt, inter alia,* the Court set forth its task:

> We must consider whether the aid results in governmental indoctrination, whether recipients of the aid are defined by reference to religion, and whether the governmental aid program constitutes an endorsement of religion [citing *Agostini* and *Helms*]. As the Court did in *Hunt,* we must first determine whether Regent is pervasively sectarian. If Regent is pervasively sectarian then, considering *Agostini*, [*Helms*] and a host of other fact-specific cases, we must determine whether the unique nature of the aid is nonetheless permitted without offending the Establishment Clause.[138]

The Virginia Supreme Court then, relying particularly on the analysis contained in footnote 7[139] to the *Hunt* case concerning the indirect nature of the aid in question, concluded that the issuance of tax-exempt bonds for Regent University (excluding portions for the divinity school which were excluded solely on Virginia law grounds) did not violate the Establishment Clause.

In *Steele I*, a lower court in the Sixth Circuit (the Middle District of Tennessee) had ruled against David Lipscomb University in its request to obtain tax-exempt bond financing, because the university was found to be a pervasively sectarian institution.[140] The District Court found that bond funds were being directly lent by a governmental entity to a pervasively sectarian institution in a way which constituted direct aid and created a governmental endorsement of religion. Further, the District Court ruled that the description of the university's religious affiliation and character in the disclosure document constituted governmental speech endorsing the university's religious views.

The *Steele I* decision is noteworthy for its factual gerrymandering. For example, while the court acknowledged that "neutrality" was the most important test, it essentially disregarded the test because it concluded that it had no evidence of whether the bond process was neutral with regard to religion. It so concluded based, *inter alia,* upon depositions of the Mayor (who did not remember signing the closing papers) and the absence of discussions of neutrality and religious involvement in the minutes of the governing body. This is most peculiar reasoning. The record, on its face, would indicate that, just as in *Sacred Heart*, the governmental body had previously issued numerous series of similar bonds under the same authority for many other institutions without regard to their religious characteristics. The finding that David Lipscomb University was "pervasively sectarian" was similarly questionable under current standards.

Further, its conclusions that the tax-exempt bond financing constituted a direct governmental endorsement of religion were exceedingly questionable on several grounds. [141]

On August 14, 2002 the Sixth Circuit Court of Appeals reversed *Steele I*. The Court of Appeals instead granted summary judgment for the governmental units and the university and denied plaintiffs' challenge to the bond issue.

According to the Sixth Circuit Court, the issue presented "is whether the issuance of tax-exempt revenue bonds violates the Establishment Clause, if the bonds are for the benefit of an institution found by the District Court to be pervasively sectarian."[142] The Sixth Circuit ruled that there was no violation. "Regardless of whether the pervasively sectarian test is still the law, we conclude that, given the nature of the aid in question, the issuance of the bonds does not offend the Establishment Clause."[143] The Sixth Circuit based its decision on the Supreme Court cases discussed above dealing with tax exemptions and tax deductions benefiting or involving religious entities. In particular, the court relied upon the *Walz, Mueller* and *Hernandez* as well as *Zelman* to conclude that the particular benefit conferred upon Lipscomb - the issuance of tax-exempt bonds - was indirect in nature and was analogous to an indirect financial benefit conferred by a religiously neutral tax exemption or deduction. The Court further noted that religious organizations unquestionably may receive "general government benefits consistent with the Establishment Clause," (quoting *Zobrest* and *Widmar*)[144] and concluded "that the issuance of tax-exempt bonds on a neutral basis is the conference of a generally available governmental benefit."[145]

The court further concluded that the proposed issuance of industrial revenue bonds for the benefit of Lipscomb University was part of a neutral program which served valid economic development and education purposes and conferred "at best only an indirect benefit" to sectarian institutions such as Lipscomb.

> In sum, the nature of the institution is not the relevant inquiry in the special type of aid at issue in this appeal. The nature of the aid conferred by the tax free revenue bonds is not direct aid. Instead, it is analogous to an indirect financial benefit conferred by a religiously neutral tax or charitable deduction and is indistinguishable from that expressly approved in *Walz* … The funding vehicle is available on the neutral basis. No government funds will be expended. Nor does any holder of a bond have recourse against the Board or Metro in the event of non-payment. The benefit to be obtained by Lipscomb University is the same provided to private companies which create identical economic opportunities. The conduit financing advances a clear governmental, secular interest in promoting economic opportunity. Finally, the revenue bond program does not present the perception of governmental endorsement of religion.[146]

Thus, *Lynn* and *Steele II* provide a positive answer to the question posed in the introduction; however, they obviously do not overrule or modify the *Hunt* dicta nor control the Supreme Court.

A Decision-Making Matrix

Therefore, from both the chronological progression and the seven distinct lines of cases discussed above, a matrix of factors emerges which governs Establishment Clause analyses including:

- Neutrality,
- The spectrum of direct versus indirect aid,
- The nature of activities assisted (i.e. the secular or religious content)
- The nature of institution assisted,
- Whether participation in, or benefits or burdens of aid programs are determined on the basis of religion, and
- Whether other constitutional rights or duties come into play.

Neutrality is a *sine qua non* for constitutionality. Neutrality is a bedrock principle under the new approach to *Lemon*. Neutral programs are indifferent to religion, and even if incidental benefits flow to religious participants in neutral programs, this indifference cleanses the program from problems. The self-evident wisdom of this core principle should not diminish its impact. The Court has steadfastly upheld the principle of neutrality and rejected efforts to root out traces of religion from participation in valid governmental programs.[147]

Given neutrality, then the point of entry into the matrix will determine the level of constitutional scrutiny.

- If aid is indirect, constitutional scrutiny is low.
- Conversely, scrutiny will be somewhat higher if aid is direct.
- "Special dangers" of endorsement or entanglement may come into play if direct aid is given to religious or pervasively sectarian institutions.
- Aid for specifically religious activities is least likely to be constitutional, absent other circumstances.
- If the penultimate factor above is triggered then aid may be suspect either because neutrality is impugned or because endorsement is likely.
- However, if the final factor of the matrix comes into play, then even religious institutions, religious activities and direct aid may be permissible (or even necessary) in some circumstances.

Application of Matrix to Tax-Exempt Bond Financings for Faith-Based Organizations

Tax-exempt financing is the most attenuated of tax benefits discussed by the courts. Some courts have likened it to a mere governmental service, like police or fire protection.[148] Others, including *Hunt*, have noted that it merely involves the creation of an instrumentality which borrowers may use simply to gain access to tax-exempt markets without other governmental support.

In a nutshell, organizations can use tax-exempt bonds to obtain more favorable rates (generally speaking) in the capital markets by using the services of a governmental conduit bond issuer. The governmental instrumentality, pursuant to a specific state statute, does not subsidize

the private organization; rather it merely provides a service by facilitating the issuance of indebtedness payable solely from the sources provided by the private institution who is the applicant/borrower. Under Internal Revenue Code Sections 103 and 145, in particular, interest on such indebtedness for the benefit of charitable, educational or religious organizations may be exempt from federal income taxation if the indebtedness complies with the rules for "qualified 501(c)(3) bonds.[149] Because the owners of the tax-exempt bonds are not subject to taxation on interest earnings, they will presumably not demand as high an interest rate as they would for comparable taxable debt.

Of course, there are a multitude of variables in assessing the benefit of these equations. Interest rates are not only affected by tax exemption, but also vary significantly in response to other factors, such as creditworthiness, security, liquidity, specific contractual terms (such as limitations on prepayments, etc.), maturity, tax risk, and other embedded features (such as holder demand rights, etc.) In addition, any tax-exempt borrower under the qualified 501(c)(3) bond rules, for example, must comply with numerous federal tax law requirements in order to qualify for tax exemption, none of which relates to religion. These compliance requirements range from the use of the project, the investment of proceeds, the timetable for expenditure of debt proceeds, limitations on investment property as collateral, public approval requirements, maturity limitations, etc.[150]

Therefore, when a faith-based organization desires to finance a capital project, it must make many choices, of which very few, if any, are related to religion. A borrower must consider what markets it may access, whether the costs (both monetary and operational) of gaining access to desirable markets is worth the benefits to be obtained, and what compliance obligations the borrower is willing to live with in order to achieve its goals. The borrower, for example, must choose whether to be in the public or private markets. It must also choose whether to be in long term or short term markets, whether to bear interest at fixed or variable rates, as well as whether to be in tax-exempt or taxable markets. Each set of choices presents both advantages and disadvantages, and a tradeoff is always involved.

A wide variety of entities besides faith-based organizations are also eligible for tax-exempt financing. For example, all other organizations exempt under Internal Revenue Code Section 501(c)(3) can theoretically qualify under federal tax law for qualified 501 (c)(3) bond status. Further, there are several additional categories of tax-exempt bonds available to private persons under the tax laws, including qualified manufacturing bonds, pollution control bonds, solid waste disposal bonds, low income housing bonds, single-family housing bonds, etc.[151]

Applicable state law also has a significant impact – all types of non-governmental entities gain access to tax-exempt conduit bond financing by virtue of a multitude of specific state statutes which authorize projects to be financed utilizing the services of a governmental conduit in order to further certain public purposes identified by the state. Each state has a variety of authorizing statutes designed to meet these distinct public purposes or separate market economic sectors. Most states provide authorization for tax-exempt bonds for health care institutions and educational institutions as well as economic or industrial development projects, among other purposes. Further, there may be separate statutes authorizing different levels of governmental entities to engage in substantially similar actions for their citizens – for example, counties, cities and states all might have parallel capacities designed to implement multiple public purposes,

each with slightly different nuances or rules. Finally, governmental schools, hospitals and other agencies which compete with non-profits also gain tax exemption for their debt directly under the Code.

None of these myriad statutes direct the use of conduit tax-exempt bond financing specifically for religious entities or activities. Most statutes, particularly those dealing with economic development job creation and similar concerns, are simply silent on the point of religion. Statutes focused on industries in which faith-based organizations have historically played significant roles (such as health or education) might have specific limitations on the financing of specific religious facilities such as chapels. A number of state statutes focused on private higher education specifically exclude professional seminaries, for example, from the list of eligible applicants, based upon early Establishment Clause restrictions then in place at the time of origination of these statutes.[152]

Tax-exempt financing confers private benefits only incidentally to the public benefit. Cases from many states specifically hold that, for purposes of these state constitutions, tax-exempt financing for private entities promotes specified public goals (such as economic development, improved health care facilities, improved educational infrastructure, and improved housing) and, therefore, primarily serves public purposes and only incidentally benefits private entities.[153] The Indiana case of *Steup v. Indiana Housing Finance Authority*[154] is illustrative. Indiana's General Assembly passed the Indiana Housing Finance Authority Act to assist citizens in the goal of home ownership. Individuals who met certain economic criteria could apply to the Housing Finance Authority for favorable rate mortgages, which were made available from the proceeds of tax-exempt bonds. A savings and loan association and others sued, alleging, among other things, that the Act authorized expenditures of state funds for private benefit without a valid public purpose. In analyzing that claim, the court noted that the purpose of the Act, to provide suitable housing for low and middle income Indiana residents, was clearly a public purpose. After arguing that provision of good housing for its citizens is a valid state concern, the court went on to hold that "the benefits received by private individuals are incidental to the execution of the legitimate public purpose."[155] The doctrine that private benefits of conduit tax exempt bonds are only incidental to the larger public benefit has been applied not only to housing programs but to student loan programs,[156] toxic cleanup,[157] nursing homes,[158] race car facilities,[159] hotels,[160] and private colleges,[161] to name only some.

It is clear as a matter of law, therefore, that conduit bond programs primarily serve valid public purposes and only incidentally benefit private entities such as religiously affiliated schools. Mere incidental benefits do not create Establishment Clause violations. Indeed, neutrally applicable public benefits cannot be withheld from citizens because of religion. The importance of these cases to our analysis should not be underestimated.

Therefore tax-exempt financing - a multi-faceted program for addressing various public purposes - is neutral in purpose and neutral in effect with regard to religion.[162] Even using the "direct aid" analytical framework, benefits can be allocated, without entanglement, to purely secular purposes. Moreover, these benefits can be extended even to pervasively sectarian institutions by yet a simple further calibration of the analysis to consider whether certain activities, otherwise neutral on their face, might be perceived as religious activities or might lead to excessive entanglement issues when conducted by a pervasively sectarian institutions.[163]

Tax-exempt financing is also clearly indirect assistance specifically within the *Walz, Mueller* and *Hunt* framework, as we have shown – perhaps more akin to mere governmental service like water, roads, sewers, police and fire protection,[164] in that it comprises a component of the financial infrastructure of society.

Finally, the *Zelman* rationale directly covers tax-exempt financing because the benefits of tax-exempt financing are mediated to institutions indirectly through the independent private decision making exemplified by the market. This is accomplished in two ways.

First, a faith-based organization which seeks to borrow money on a tax-exempt basis has no guarantee of lower rates or any other beneficial result at all. While tax-exempt rates are generally lower than comparable taxable rates, that is not always so. In recent years, numerous market circumstances, particularly in the short term variable rate demand bond market, have produced a neutral or crossover relationship between taxable and tax-exempt interest rates. Often the form and structure of debt has more bearing on the interest rates and total effective costs than whether debt is tax-exempt or taxable.[165] Tax exemption is simply one of the variables.

The benefits of tax exemption flow directly not to the faith-based borrower but to the investor who lends the money or buys the bonds. That taxpayer reaps the direct benefits of the imputed government aid, much like the taxpayer parents in *Mueller*. This phenomenon is directly in accord with the *Zelman* line of cases. The market – which is the prototype model for the cumulative effect of myriad individual decisions – determines the extent to which that benefit is passed on to tax-exempt borrowers. The ratio of tax-exempt interest rates to taxable rates is simply not fixed. Only a small part of this variable equation is due to differences between tax brackets, because the market in the aggregate produces significant shifts in the total tax burden far less frequently than the market produces differing interest rate results. On multiple occasions in recent years, the tax-exempt market has not performed substantially better (as measured by lower interest rates) than comparable taxable instruments. Under these circumstances, in essence, the countless individual decisions of private market participants have not acted to pass substantial portions of the benefit of tax exemption on to borrowers. Thus, the benefits of tax-exempt borrowing in terms of substantially lower rates are not constant and are allocated to individual borrowers by the market rather than by the borrower or the government.

Second, tax-exempt markets as a whole are completely insensitive to whether the borrower is religiously affiliated, sectarian, non-sectarian or wholly secular. Market players simply pay no attention to these artificial distinctions when evaluating where to direct their capital and how much of the benefit of tax exemption to pass through to borrowers. Given a similar risk profile, there is simply no financial incentive for a bondholder to choose for or against a religious college, for example, as compared to a secular college.[166]

In sum, individual faith-based organizations are part of a broad array of citizenry engaging in capital project financing who gain access to tax-exempt markets in the hope and expectation, but not the certainty, that they will receive benefits in the form of reduced cost of funds. The actual benefits are provided first to bondholders who receive the actual benefit of exemption from taxation. The market as a whole, which is governed by the countless individual choices made by market participants, decides the extent to which it allocates a portion of the

benefits of tax exemption to tax-exempt borrowers. A borrower's religiosity has no impact whatsoever in this decision making process.

Tax-exempt bond financing thus fits directly within the line of cases extending from *Mueller* and culminating in *Zelman;* therefore, even for pervasively sectarian institutions, it should normally not be subject to constitutional challenge on Establishment Clause grounds. Indeed, under the rationale of *Zelman,* even tax-exempt financing which produces substantial benefits for the religious mission of pervasively sectarian institutions should not be subject to Establishment Clause challenge, because those benefits are mediated through the private decision making of the market on a basis which is wholly neutral between the religious and non-religious.

Is that the end of the analysis? Are we sufficiently armed to deal with the problem scenarios described in the introduction?

The final factors of the matrix are not expressly covered by *Zelman, Helms* or *Agostini,* and deserve further attention. First, we address the interplay of various constitutional rights in this context.

What are the constitutional implications of the denial by a municipality, for example, of a bond application for a pervasively sectarian school when it has previously served its secular counterpart? Recent cases make clear that this is a free exercise and free speech issue and not an establishment issue. In *Rosenberger*, government funding of an evangelical student newspaper was not only permitted, but required. In various cases, the use of public property by religious entities for worship could not be prohibited because of the Establishment Clause.[167] Finally, the Court has recently ruled that a religious club could not be excluded from after-school access in middle school because of Establishment Clause concerns.[168]

Do these cases mean that a religious school that requires its constituents to sign a faith statement must be given access to tax-exempt financing if others are eligible?[169] While it is tempting to suggest that this would foster the illegitimate practice of determining eligibility by reference to religion, in fact the opposite is true, because the true issues are free speech and free exercise rather than establishment. One of the difficult questions facing many counsel is whether a college which limits its constituents to a particular faith, for example, is ineligible for bond financing because such assistance would result in an allocation of benefits based on religious litmus tests. Some counsel take this approach. This is, however, a faulty analysis, because it ignores *Zelman's* rejection of the snapshot approach of analyzing effect. *Zelman* requires a look at the entire panoply of aid and the entire range of applications.[170] The proper analysis of this situation is under free speech and free exercise principles. The argument that faith statements make an institution ineligible for participation in neutral programs sounds suspiciously like content-based speech discrimination and, therefore, constitutionally dubious. *Zelman* makes clear that a review of all facets of a program over time is the proper basis for analysis and not a single snapshot.

Counsel for governmental entities in these types of circumstances would be well advised to review these decisions with care, and heed the recent saga of Columbia Union College in the Fourth Circuit, where the Court of Appeals has specifically required the State of Maryland to

allow the college's participation in its Sellinger program. The court concluded with the following statement:

> [T]he State of Maryland 'infringed on Columbia Union's free speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint.' Because denying funding to Columbia Union is not mandated by the Establishment Clause, the State cannot advance a compelling interest for refusing the college its Sellinger Program funds…
>
> We recognize the sensitivity of this issue, and respect the constitutional imperative for government not to impermissibly advance religious interests. Nevertheless, by refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief. (Citations omitted).[171]

Similarly, in *Davey,* the Ninth Circuit recently concluded that the State of Washington could not assert "super-establishment clause" concerns as a defense against religious discrimination in the application of neutral and secular aid programs:

> We hold that HECB's policy denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion. As the Court recently reiterated, the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse'.[172]
>
> Therefore, the criterion that conditions receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective must be stricken…Nor does the establishment clause in Washington's Constitution excuse HECB's disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology.[173]

If, following *Zelman,* the religious character of an ultimate beneficiary of indirect aid and the religious activities pursued therein are irrelevant, is nothing off limits? Can church sanctuaries be financed under general economic development statutes? The penultimate factor (or factors) described above in the matrix come into play in this context. Bond lawyers must remain sensitive to the question of endorsement, and this can prove to be an extremely difficult task. Whether such a financing could pass muster under Justice O'Connor's reasonable observer inquiries is open to doubt. After all, a church sanctuary serves essentially one purpose – worship – which has no readily identifiable corollary in secular life. Education is, after all, education

from whatever perspective it is delivered. Health care, social service delivery and other charitable activities are strongly nuanced by the motivations of providers, but are readily recognizable from one world to the next and remain essentially the same. Communal worship is, however, a quintessentially religious activity on its own merits, and not simply an activity which can be undertaken from both the secular and religious perspectives. The risk of endorsement might well be too high in the context of the affirmative application of a church for tax-exempt financing for its sanctuary, given the public hearing, public approval and governmental approval processes.

However, this does not automatically close the door for other closely related activities. For example, suppose a state enacts a program to provide a multitude of tools for the preservation and restoration of historic properties, including grants, low interest loans, special tax benefits and tax-exempt financing. Should the 18th Century church down the street from the 18th Century tavern be treated differently under this type of governmental program simply because of the religious activities? Similarly, a state program designed to promote more effective energy savings and life safety systems in buildings (particularly in renovation or rehabilitation projects) bears a substantial set of secular purposes unrelated to religion which might also allow participation of churches on the same basis as other society members. Endorsement casts a much smaller shadow in each of these environments.

Bond lawyers, therefore, must explore whether the statute is, in fact, neutral in purpose and neutral in effect. Bond lawyers should look to *Zelman* for clues as to the methodology for conducting this neutrality analysis. Neutrality, under *Zelman,* is not measured by the characteristics of a single applicant, but rather by the broad array of choices applicable over time. Bond lawyers should also be sensitive to the nature of an institutional applicant, but only to the extent it helps them gauge whether the bond financed facilities are essentially religious in character. If so, bond lawyers must then look carefully at whether circumstances would lead a reasonable observer to conclude that, by virtue of assisting in tax-exempt financing, the government had provided an endorsement of religious views. This path can become quite fact-sensitive, obviously, but should be pursued with good faith and courage.

We have examined these seven lines of authority moving away from the wall, developed an analytical matrix and applied it to several problem scenarios. What can we conclude about any remaining law from the Separationist Period?

- *Ball, Aguilar, Wolman* and *Meek* have all been overruled.
- *Nyquist* has been severely limited and may now fairly be read as a case turning on an improper, non-neutral purpose.
- Full-blown exceptions for both direct aid and indirect aid have been developed.
- As we have seen, the doctrine of pervasive sectarianism has been marginalized to a very significant degree.
- The access cases applicable to both "physical and fiscal" fora, as well as the free exercise and free speech cases, have been

developed significantly as counterweights to the old Establishment Clause cases over the last 20+ years.

- The *Roemer* line of cases has been significantly limited in the lower courts in response to new Supreme Court decisions.
- *Lemon's* entanglement holdings remain intact; except that, post *Agostini* and *Helms,* the monitoring requirements causing *Lemon's* failings have evaporated and the presumptions requiring significant monitoring have been abandoned.
- The "prayer" cases remain largely unchanged, indicating that actual endorsement and indoctrination are still intolerable. However, the courts are far less willing now to impute these ills to normal interactions between church and state.

We note that *Tilton, Hunt* and *Roemer* all, in fact, allowed aid to religious entities but contained limitations in dicta. It is the limitation on that applicability and the rationales underlying those limits which have subsequently been superceded, undermined, abandoned or removed by subsequent case law. Finally, the neutrality of purpose and effect remains a vital element of the First Amendment and has been returned to the center of inquiries. Neutrality is still zealously guarded but now from both sides of the street. In many ways, we have returned substantively to the basic premises and principles of the Assertive Period; however, we are now a little wiser and careful, and that is not a bad result.

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[1] or Jewish day schools or other Christian schools for that matter.

[2] "Pervasive sectarianism" was described in *Roemer* (cited *infra* note 11) as a state in which secular activities cannot be separated from secular ones. Similarly in *Hunt v. McNair* ("*Hunt*") the Court stated "aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. 734, 743 (1973). The Supreme Court referred to three different factors in analyzing Baptist College in *Hunt,* and six in Roemer. See also *Columbia Union*, (cited *infra* note 92) (four factors), and *Lynn* (cited *infra* note 39) (six factors).

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. CONST. AMEND I. The two elements of this portion of the First Amendment addressing religion are referred to herein as the "Establishment Clause" and the "Free Exercise Clause," and collectively as the "Religion Clauses."

[4] Bond counsel must give an "unqualified opinion", substantially to the effect that bonds are legal, valid and binding obligations enforceable in accordance with their terms, in order to allow bonds access to markets. See National Association of Bond Lawyers, Fundamentals of Municipal Bond Law 2002 ("*NABL Fundamentals*") Part 1, "General Law – Overview", and Part 4, "Professional Responsibility, Model Bond Opinion Report"

[5] *See Hunt*.

[6] *Hunt,* 413 U.S. at 745, n. 7.

[7] Tilton v. Richardson, 403 U.S. 672 (1971) ("*Tilton*"). *Tilton* involved direct cash grants for building projects by private colleges from tax dollars, and applied the *Lemon* test.

[8] Walz v. Tax Commissioner of City of New York, 397 U.S. 664 (1970) ("*Walz*"). *Walz* approved property tax exemptions for churches in New York.

[9] *Hunt,* 413 U.S. at 743-45. *See also Tilton*.

[10] Lemon v. Kurtzmann, 403 U.S. 602 (1971) ("*Lemon*"). *See infra* note 31.

[11] Roemer v. Bd. Of Public Works, 426 U.S. 736 (1976) ("*Roemer"*). *Roemer* involved direct cash grants to private colleges for operating purposes. *See also*, the *Columbia Union* cases, *infra*.

[12] *See* Clayton v. Kerwick, 285 A.2d 11 (N.J. 1977) ("*Clayton*"); California Ed. Fac. Auth. v. Priest, 526 P.2d 513 (Calif. 1974) ("*Priest*"); Minnesota Higher Educ. Facilities Authority v. Hawk, 232 N.W. 2d 106 (Minn. 1975) ("*Hawk*"); and Cercle v. IEFA, 288 N.E. 2d 399 (Ill. 1972) ("*Cercle*").
[13] School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) ("*Ball*") and Aguilar v. Felton, 473 U.S. 402 (1985) ("*Aguilar*").
[14] *See e.g.*, Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) ("*Zobrest*"); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 4811 (1986) ("*Witters*") and Mueller v. Allen, 463 U.S. 388 (1983) ("*Mueller*").
[15] "Bond Counsel should not render an unqualified opinion…unless it has concluded that it would be unreasonable for a court to hold to the contrary" *NABL Fundamentals*, Part 4 at 39.
[16] In addition to *Zobrest, Mueller* and *Witters, see* Agostini v. Felton, 521 U.S. 203 (1997) ("*Agostini*") and Mitchell v. Helms, 530 U.S. 793 (2000) ("*Helms*").
[17] *Id.* In addition, *see* Zelman v. Simmons-Harris, No. 00-1751, 2002 U.S. LEXIS 4885 (U.S. June 27, 2002) ("*Zelman*").
[18] *Walz,* 397 U.S.at 676.
[19] *Lemon*, 403 U.S. at 612. The Court stated that there are "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (*quoting Walz*, 397 U.S. at 668). The Court also focused on the evils of entanglement and political divisiveness. *Lemon* at 622-24.
[20] *See*, for example, note 168 *infra*. "The First Amendment requires government neutrality, not hostility to religious belief." *Columbia Union IV* (cited *infra* note 90) at 510.
[21] *Lemon,* 403 U.S. at 614.
[22] *Walz,* 397 U.S.at 676.
[23] McCollum v. Bd. Of Educ., 333 U.S. 203 (1948).
[24] Engle v. Vitale, 370 U.S. 421 (1962).
[25] Abington v. Schemp, 374 U.S. 203 (1963).
[26] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[27] McGowan v. Maryland, 366 U.S. 420 (1961).
[28] Everson v. Bd. Of Educ. 330 U.S. 1 (1947) ("*Everson*").
[29] *See, e.g. Everson*.
[30] *See* 21 HARVARD J.L. & PUB. POL'Y 657 (1998).
[31] *Lemon,* 403 U.S. at 612-13.
[32] *See Tilton*; *Hunt; Roemer*, Meek v. Pittenger, 421 U.S. 349 (1975) ("*Meek*") (*overruled by* Mitchell v. Helms, 530 U.S. 793 (2001)); and Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) ("*Nyquist*").
[33] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) ("*Lamb's Chapel*").
[34] *See, e.g.; Agostini* (even if Title I aid indirectly benefits parochial schools, it is acceptable); *Zobrest*, (relief of burden of paying for interpreter is acceptable incidental benefit); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) ("*Rosenberger"*) (student religious paper receiving state funds is acceptable because of neutral and generally applicable funding program for student activities).
[35] The secularist society of Justice Douglas is based on a conception of government as the source of all rights. The state grants the church the right to exist and grants persons the right to practice their religion. Such a concept is contrary to a theory of natural rights that holds that the rights encompassed by the Bill of Rights guarantee of religious liberty are inalienable rights, constitutive of the human person. They are implied in the fact of the person, not given by a state. At most a state may recognize those rights; it cannot create them. Likewise, the idea that the church is dependent on the state for a right to exist is a secularist assumption that is, I submit, a foreign notion in our history and culture. This view point finds its fullest expression in cases which follow through the 1970s and early 1980s, such as *Roemer*, *Meek*, *Ball*, and *Aguilar*.
[36] For other criticisms of *Lemon* by the Court, *see* Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687, 716-723 (1994) ("*Kiryas Joel"*); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655-57 (1981) (*"Allegheny County"*); *Lamb's Chapel*. *See, generally* Michael S. Paulsen, "Lemon is Dead," 43 Case W. Res. L. Rev. 795 (1993).
[37] Wallace v. Jaffree, 472 U.S. 38, 98-114 (1985) (Rehnquist, J., dissenting) ("*Wallace*").
[38] *Lemon*, 403 U.S. at 614.
[39] *Wallace,* 472 U.S. at 69 (citing Lynch v. Donelly, 465 U.S. 668 (1984) at 687-689) (*Lynch"*) (O'Connor, J., concurring).
[40] Agostini v. Felton, 521 U.S. 203 (1997) ("*Agostini*").

[41] See "Paths Away from the Wall" *infra*.
[42] *See Agostini*.
[43] *Id.* at 222.
[44] *Id.* at 223 (*citing Zobrest*, 509 U.S. at 1).
[45] *Id.* at 224 (*citing Witters*, 474 U.S. 418).
[46] *Id.* at 231.
[47] *Id.*
[48] *Id.* at 233 (*summarizing* Bowen v. Kendrick, 487 U.S. 589, 615-617 (1988) ("*Bowen*") ("no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits")).
[49] Query, however, the Court's statement that the New York City program "does not run afoul of any of the **three primary criteria we currently use** to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. . . . The same considerations . . . require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 234 (emphasis added).
[50] *Mitchell v. Helms,* 530 U.S. 793 (2001) (*"Helms"*).
[51] *Meek* 421 U.S. at 350 (1975) (*overruled* by *Helms*) (holding that the direct loan of instructional materials and equipment to nonpublic schools […] has the unconstitutional primary effect of establishing religion because of the predominantly religious character of the schools benefiting).
[52] Wolman v. Walter, 433 U.S. 229, 248 (1977) ("*Wolman*") (holding that even though the loan for instructional material and equipment is ostensibly limited to neutral and secular instructional material and equipment, it inescapably has the primary effect of providing a direct and substantial advancement of sectarian education); overruled in part by *Helms.*
[53] *See Agostini* (approving a program under Title I of the Elementary and Secondary Education Act of 1965 that provided public employees to teach remedial classes at religious and other private schools).
[54] *Helms* 530 U.S. at 809.
[55] *Id.* at 822
[56] *Id.* at 829.
[57] *Id.* at 837.
[58] *See Zelman.*
[59] In all, the Justices delivered six opinions, with two concurrences (by Justices O'Connor and Thomas) and three dissents (by Justices Breyer, Stephens and Souter). Justices Kennedy, O'Connor, Scalia and Thomas joined the Chief Justice in the majority opinion.
[60] The voucher program is found at Ohio Rev. Code Ann. §§ 3313.974-3313.979 (Anderson 2002), and is known as the Pilot Project Scholarship Program.
[61] *Zelman* at [2-6].
[62] *Id*. at [3].
[63] *Zelman* at [7]. The concurrence by Justice O'Connor focused the issue as follows:

> "The Court's opinion…focuses on a narrow question related to the (*Lemon v Kurtzman*) test: how to apply the primary effects prong in indirect aid cases? Specifically it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries rather than directly to service providers has the primary effect of advancing or inhibiting religion or as I have put it, of "endorsing or disapprov[ing]…religion" (citation omitted) (emphasis added). O'Connor concurrence at 708.

[64] *See* Helms*,* Agostini and Rosenberger. This trio of cases is put in the same basket by the Chief Justice, but have varying degrees of "directness" of aid, ranging from cash *(Rosenberger)* to publicly funded teachers (*Agostini*) to auxiliary items loaned by a state entity to a private school (*Helms*).
[65] *Zelman* at [7] citing *Mueller, Witters* and *Zobrest.*
[66] *Id.* at [10].
[67] *Id.*
[68] *Id.* at [13].
[69] *Id.* at [9 and 17].
[70] *Id.* at [19].
[71] *Nyquist* 413 U.S. at 783, n. 38.
[72] *Zelman* at [20].

[73] Newdow v. U.S. Congress, et.a*l.* 292 F.3d 597 (Ninth Cir. 2002) citing *Wallace* and Lee v. Weisman 505 U.S. 577 (1992), inter alia.
[74] *Santa Fe Independent School District v. Doe* 530 U.S. 90 (2000) *("Santa Fe")* (involving public pregame prayers at high school football games). See also *Wallace,* in which the Court struck down an amendment to an Alabama statute expanding the purpose for an authorized minute of silence solely to include "voluntary prayer"; *compare*, however, Marsh v. Chambers 463 U.S. 783 (1983) upholding the right of the Nebraska legislature to open with prayer.
[75] Capital Square Review and Advisory Board v. Pinnette*,* 515 U.S. 753, 780 (1995) ("*Capital Square*").
[76] *See, e.g*. *Lynch* and *Allegheny County*.
[77] Widmar v. Vincent, 454 U.S. 263 (1981) *("Widmar").*
[78] Westside Community Bd. Of Ed. V. Mergens, 495 U.S. 226 (1990) (*"Mergens"*).
[79] Lamb's Chapel v. Center Moriches Union Free Sch. Dist. 508 U.S. 384 (1993) ("*Lamb's Chapel"*).
[80] Good News Club v. Milford Central School District, 533 U.S. 1980 (2001) (*"Good News"*).
[81] McDaniel v. Paty, 435 U.S. 618 (1978)
[82] *See Rosenberger*, *supra*.
[83] Texas Monthly Inc. v. Bullock, 489 U.S. 1 (1989) (*"Texas Monthly"*). *See also Kiryas Joel*, note 35 *supra*.
[84] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (*"Lukumi Babalu"*).
[85] Davey v. Locke, No. 00-35962, 2002 U.S. App. LEXIS 14461(*"Davey"*) at *20 (9th Cir. July 18, 2002).
[86] In the majority opinion, for example, the phrases "religious schools" or "non-religious schools" (and variations thereon) are used over 55 times, while the term "pervasively sectarian" is never used. While the modifiers "sectarian" or "non-sectarian" are used 11 times, it is always within a quotation. Similarly, in the O'Connor concurrence, the words "religious" or "non-religious" are used as modifiers well over 50 times without a single use of the words "sectarian," "non-sectarian" or "pervasively sectarian".
[87] Va. College Bldg. Auth. v. Lynn, 538 S.E. 2d 682, 694, ("*Lynn*") citing *Helms,*(O'Connor concurring) 530 U.S. at 841, in turn citing *Bowen* , 487 U.S. at 634 (Kennedy, J. concurring)
[88] *See Roemer*.
[89] *Roemer,* 462 U.S. at 755.
[90] Columbia Union College v. Clarke, 988 F. Supp. 897 (D. Md. 1997), ("*Columbia Union I*") *vacated by, remanded by* Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), ("*Columbia Union 2*") Columbia Union College v. Oliver, 2000 U.S. Dist., Lexis 13644 (D. Maryland, August 17, 2000) ("*Columbia Union III*") *aff'd by* Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001) ("*Columbia Union IV*").
[91] *See Columbia Union II*.
[92] *Id. Compare*, however, the 6 part test under *Lynn.*
[93] *Id.*
[94] *See Columbia Union III*.
[95] *See Columbia Union IV*.
[96] *Walz,* 397 U.S. at 673.
[97] *Id.* at 674-675.
[98] *Id.* at 676-677.
[99] *Id.* at 676.
[100] *Zelman*, (O'Connor, J., concurrence at [4]).
[101] *Mueller* 463 U.S. at 396, n. 5.
[102] *Id.* at 397.
[103] *Id.* at 400.
[104] *Hunt* 413 U.S. at 745, n. 7.
[105] Witters v. Washington Dept. of Servs. For Blind, 474 U.S. 481 (1986) ("*Witters*").
[106] Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989) ("*Hernandez*").
[107] *See Zobrest.*
[108] As should be clear by now, lawyers advising clients on the interaction of religious institutions and governmental programs, should first consider the question, "what would Justice O'Connor do?" She is by far the single most significant voice in shaping the last 20 years of Establishment Clause jurisprudence. She is the essential component for majority decisions and the principal architect of the Court's current framework.
[109] *Zelman* (O'Connor, J., concurrence at [2]).
[110] *Mueller,* 463 U.S. at 399.

[111] *See, e.g.*, *Zelman* at [10] and Steele v. Industrial Development Board of Metropolitan Government of Nashville (cited *infra* note 140 as *Steele I*).
[112] *Helms* 530 U.S. at 841 (O'Connor, J. concurrence, citing Kennedy concurrence in *Bowen*.
[113] *Rosenberger,* 515 U.S. at 842.
[114] *See Everson*.
[115] Board of Education v. Allen, 392 U.S. 236 (1968).
[116] *See Rosenberger*.
[117] *See Agostini.*
[118] *See Wolman*.
[119] *See Helms*.
[120] *See Bowen*.
[121] *See Wolman.*
[122] *See Walz.*
[123] *See Mueller.*
[124] *See Witters.*
[125] *See Zobrest*.
[126] *See Zelman*.
[127] *See Hernandez.*
[128] *Helms,* 530 U.S. at 829.
[129] *Id.* at 837.
[130] Johnson v. Econ. Dev. Corp. , 241 F.3d 501 (Sixth Circuit 2001) ("*Sacred Heart"*).
[131] *Sacred Heart* at 519 (Nelson, J. conc.)
[132] *See, e.g.*, *Agostini,* 521 U.S. at 237-38.
[133] Habel v. Indus. Dev. Auth., 400 S.E.2d 516 (Va. 1991), ("*Habel*") *overruled by* Virginia College Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000) ("*Lynn"*).
[134] *See Lynn*.
[135] *See Bowen*.
[136] *Lynn,* 538 S.E.2d at 694.
[137] *Id.* at 695.
[138] *Id.* at 699.
[139] *Hunt* 413 U.S. at 745.
[140] Steele v. Ind. Dev. Bd. Of Metro Gov't of Nashville and Davidson County, 117 F.Supp. 2d 693 (MD Tenn. 2000), ("*Steele I"*), *overruled by* Steele v. Industrial Development Board of Metropolitan Government of Nashville, et. al., No. 00-6646, 2002 U.S. App. LEXIS 16375 (6th Cir. Aug. 14, 2002) ("*Steele II"*).
[141] (Compare, e.g., *Columbia Union III* and *IV*)
[142] *Steele II* at * 13.
[143] *Id.* at * 20.
[144] *Id.* at * 38.
[145] *Id.*
[146] *Id.* at * 43-44.
[147] For example, incidental aid that may flow to a religious institution as the result of a neutrally applied program with a general public purpose is acceptable. So even if the Title I program in New York parochial schools results in some indirect benefit to the schools, that is an acceptable outcome not in violation of the Constitution. (*Agostini)* In *Zobrest*, an incidental benefit flowing to the Catholic school that had the state-paid interpreter provide services to one of its students that would have had to been provided at cost to the school is acceptable. And the fact that the University of Virginia student magazine *Wide Awake* received tax payers money to publish sectarian articles on religion is acceptable, because the students qualified under a generally applicable law providing funds for student activities. (*Rosenberger)* Neutrality in recent cases has also meant that a state program providing funds to a blind student attending a state college could not be taken from him when he decided to enroll in a Bible college. (*Witters)* A Texas law that permitted tax-exemptions for religious magazines but denied exemptions to similar non-religious magazines was judged not sufficiently broad and neutral to pass Establishment scrutiny. (*Texas Monthly)* A public school was not able to decide who could use its facilities based on whether the organization wanting space was religious or not. (*Mergens)* A Florida statute aimed at restricting the Santeria practice of animal sacrifice, but couched as a generally-applicable ban on animal killing, was not sufficiently neutral

to survive Court scrutiny. (*Lakumi Babalu)* A school could not decide what community groups could use its facilities for meetings based on the religious nature of the groups. (*Lamb's Chapel)* A New York law creating a special school district to benefit children of a Satmar Hasidim community was not neutral because it gave preference to one religion above another, and, therefore, was improper. (*Kiryas Joel*)

[148] *See* Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11 (N.J. 1977) (financing was not aid in the usual sense); California Educ. Facilities Auth. v. *Priest*, 526 P.2d 513, 517 (Cal. 1974) (aid was incidental benefit to religious schools like police or fire protection); Minnesota Higher Educ. Facilities Auth. v. Hawk, 232 N.W.2d 106 (Minn. 1975) (financing was a tax-exemption); and Cecrle v. Illinois Educ. Facilities Auth., 288 N.E. 2d 399 (Ill. 1972) (aid is a form of tax-exemption). See *Steele II* note 4 at 15.
[149] I. R. C. §§ 103, 145.
[150] *See, e.g.*, I. R. C. §§ 141, 145, 147-150, for example.
[151] *Id.*, §§ 142-144.
[152] *See, e.g.,*. Ind. Code Ann. § 20-12-63-3(10)(F) (West Supp. 2002).
[153] *See generally*, Wayne Foster, Annotation, *Validity, Under State Constitution and Laws, of Issuance by State or State Agency or Revenue Bonds to Finance or Refinance Construction Projects at Private Religious-Affiliated Colleges or Universities*, 95 ALR 3d 1000.
[154] Steup v. Ind. Hous. Fin. Auth., 402 N.E.2d 1215 (1980).
[155] *Id.* at 1222. *See also* Hawkins v. City of Greenfield, 230 N.E.2d 396 (Ind. 1967); Utah Hous. Fin. Agency v. Smart, 561 P.2d 1052 (Utah 1977); and State ex rel. Douglas v. Nebraska Mortgage Fin. Fund, 283 N.W.2d 12 (Neb. 1979).
[156] Turner v. Woodruff, 689 S.W.2d 527 (Ark. 1985).
[157] State v. Inland Protection Fin. Corp., 699 S.2d 1352 (Fla. 1997).
[158] State v. Volusia County Indus. Dev. Auth., 400 So.2d 1222 (Fla. 1981).
[159] Mid-America Pipeline Co. v. Lario Enter., Inc., 716 F.Supp. 511 (D.D.C. 1989).
[160] Anderson v. McCann, 469 A.2d 1311 (N.H. 1983).
[161] Minnesota Higher Educ. Facilities Auth. v. Hawk, 232 N.W.2d 106 (Minn. 1978).
[162] *See e.g., Zelman* and *Sacred Heart.*
[163] *Id.* See also*, Lynn*.
[164] See, e.g. *Sacred Heart, Lynn, Hunt* and *Walz.*
[165] For example, a taxable daily rate mode variable rate demand instrument might well bear lower interest costs than a fixed rate tax-exempt instrument with a similar rating and the same nominal maturity.
[166] *Sacred Heart*, 241 F.3d at 515.
[167] *See Lamb's Chapel, Capitol Square, Mergens* and *Widmar.*
[168] *See Good News*.
[169] Against whom would such a school properly be compared? Other schools without similar restrictions, other non-profit applicants or all indirect aid applicants?
[170] *Zelman* at 9 and 17.
[171] *Columbia Union IV* 254 F.3d at 510.
[172] *Davey* at *20, citing *Good News,* 533 U..S. at 114 (quoting *Rosenberger,* 515 U.S. at 839).
[173] *Id*.